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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), exempts from mandatory disclosure the work-product of government attorneys when the litigation for which the material was prepared has ended and the government cannot demonstrate that related litigation exists or potentially exists.

PARTIES TO THE PROCEEDING

The parties in the court of appeals, in addition to those named in the caption, were the members of the Federal Trade Commission. At present, the members of the Commission are James C. Miller, III, Chairman, and Michael Pertschuk, David M. Clanton, and Patricia P. Bailey, Commissioners.

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FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 671 F.2d 553. The opinion of the district court (App. E, *infra*, 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1982 (App. B, *infra*, 15a) and a timely petition for rehearing was denied on April 7, 1982 (Apps. C and D, *infra*, 16a, 19a). By orders of June 29, 1982 and August 3, 1982, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Subsection (a)(3) of the Freedom of Information Act, 5 U.S.C. 552(a)(3), provides:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

Subsection (b)(5) of the Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

This Freedom of Information Act ("FOIA") suit arose out of a request by respondent Grolier Incorporated for documents of the Federal Trade Commission ("FTC") concerning, among other things, a covert investigation by the FTC of one of Grolier's subsidiaries, the Americana Corporation (App. A, *infra*, 1a).[1] Americana had been the defendant in a civil penalty action filed by the Department of Justice in 1972 (*United States* v. *Americana Corp.*, Civil No. 388-72 (D.N.J.)) (App. A, *infra*, 1a).[2] The FTC complied in part with the FOIA request, but it withheld part or all of seven documents relating to the investigation of Americana. Grolier then brought suit in the United States District Court for the District of Columbia to compel release of those documents.

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[1] In addition to records relating to the Americana investigation ("Category A" records), Grolier also requested records relating to covert investigations of any of its 14 subsidiaries ("Category B" records) and records relating to covert investigations of any related person, company or entity ("Category C" records). However, Grolier's district court complaint was confined to Category A and B records, and Grolier later withdrew any claim for further disclosure of Category B documents. Thus, Grolier's appeal involved only Category A records. See Appellant's Opening Brief at 2 n.1.

[2] The civil penalty action was based upon an alleged violation of a 1949 cease and desist order prohibiting misrepresentations in door-to-door sales and false advertising. It was dismissed with prejudice in 1976 after the Commission declined to comply with a district court order directing it to turn over certain documents to the defendant (App. A, *infra*, 2a).

The FTC contended that certain of the documents,[3] including the four still at issue (*i.e.*, Numbers 3, 5, 6, and 7), fell within Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because they were work-product compiled by FTC attorneys in anticipation of the civil penalty action against Americana and therefore would normally be privileged in the civil discovery context. Because Exemption 5 "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)), the FTC maintained that the documents sought by Grolier were exempt from disclosure.

After reviewing the documents in camera, the district court found (App. E, *infra*, 23a) that they "encompass opinions by attorneys regarding the evidentiary needs of the Americana action" and that "[t]hey also discuss specific methods of obtaining evidence in that litigation." The court held (*ibid.*) that "the documents [fell] within the rubric of 'mental impressions, conclusions, opinions or legal theories' " under Rule 26(b)(3) of the Federal Rules of Civil Procedure and that they accordingly fell within Exemption 5 of the FOIA.

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[3] The FTC withheld two other documents—Numbers 1 and 2—on the grounds that they were work-product and pre-decisional. Court of Appeals Joint Appendix ("C.A. App.") 60-61. The district court upheld the withholding under the work-product rationale (C.A. App. 113). Grolier subsequently withdrew its claim for disclosure of document 2 (App. A, *infra*, 2a n.3). The court of appeals affirmed the district court's judgment regarding document 1 under the pre-decisional rationale (*id.* at 8a).

The Commission also withheld document 4 as an attorney-client communication (C.A. App. 62). Both the district court and the court of appeals upheld the withholding on this basis (C.A. App. 113-114; App. A, *infra*, 2a n.3).

A divided court of appeals vacated the district court's judgment regarding those four documents. The panel majority conceded that "[t]here is no question that the documents involved were work-product prepared as a part of the *Americana* action" (App. A, *infra*, 2a). However, the majority stated that the applicability of Exemption 5 of the FOIA depended upon "whether these documents continue to be privileged against disclosure several years after the *Americana* suit was terminated" (*ibid.*).

The court below noted (App. A, *infra*, 3a-4a, quoting *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) emphasis added in opinion) that several courts of appeals and district courts had held that "there is 'a *perpetual* protection for work product' extending beyond the termination of the litigation for which the documents were prepared." However, the court concluded (App. A, *infra*, 5a) that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." The court reasoned (*id.* at 6a) that effective legal representation would not be adversely affected by disclosure of attorneys' mental impressions, conclusions, opinions, or legal theories "[w]hen litigation has ended and no potential for related actions exists * * *." Accordingly, the court held (*id.* at 7a; emphasis in original) that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists."

Applying that test to the present case, the court of appeals rejected the suggestion that Grolier's FOIA suit constituted related litigation (App. A, *infra*, 8a) and stated (*id.* at 7a) that "there does not appear to be any suit or potential suit related to the original *Americana* action." The court therefore remanded the case "for

reconsideration of the applicability of the work-product privilege in light of the apparent absence of related litigation" (*id.* at 7a-8a).

Judge MacKinnon dissented. In his view, the Commission properly withheld the requested documents under Exemption 5 "because the termination of the litigation to which the work-product relates does not destroy this privilege" (App. A, *infra*, 9a). Moreover, assuming that the work-product privilege were limited by a "related case" rule, Judge MacKinnon concluded that "the present suit could not be more directly related to the *Americana* litigation" (*id.* at 13a).

The court of appeals subsequently denied the government's suggestion for rehearing en banc by a vote of five to four (App. D, *infra*, 19a-20a).[4]

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the scope of protection afforded by Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to the work-product of government attorneys. The court of appeals' resolution of that question is inconsistent both with this Court's opinion in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), and with the decisions of three other courts of appeals. In addition, it will have a serious adverse impact upon the government's ability to conduct civil and criminal litigation effectively.

1. Exemption 5 of the FOIA protects from disclosure "memorandums or letters which would not be available by law to a party other than an agency in litigation with

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[4] Judges Tamm, MacKinnon, Robb and Ginsburg voted to grant en banc review. Judges Mikva and Bork did not participate in the consideration of the petition (App. D, *infra*, 20a).

the agency." 5 U.S.C. 552(b)(5). This exemption was clearly intended to protect the working papers of government attorneys from disclosure. The Senate Report stated (S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965)) that the material protected by Exemption 5 "include[s] the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." This Court has also noted that it is "clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5." *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 154. See *FOMC* v. *Merrill*, 443 U.S. 340, 353 (1979).

The work-product privilege was first recognized by this Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In the context of civil discovery, the privilege protects relevant and otherwise non-privileged material in an attorney's files from his adversaries' discovery requests (see Fed. R. Civ. P. 26(b)(3)). Facts in an attorney's file that are "essential to the preparation of [an adversary's] case" may be discovered only upon a showing of necessity (*ibid.*; see also *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511). However, "[i]n ordering discovery of such materials when the required showing has been made," courts must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney * * * concerning the litigation." Fed. R. Civ. P. 26(b)(3); see also Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C. App., at 442; *Upjohn Co.* v. *United States*, 449 U.S. 383, 399-401 (1981). Because the work-product privilege is qualified, the particular circumstances of the party requesting discovery—for example, the party's needs for the material in preparing his case—are an important factor in determining whether the privilege will be honored. Moreover, in civil discove-

ry, a court may enter a protective order permitting disclosure of work product only to particular persons and "only on specified terms and conditions" (Fed. R. Civ. P. 26(c)(2)).

Under the FOIA, by contrast, such an individualized approach is not possible. The FOIA does not "by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). Instead, the FOIA requires information subject to disclosure to be made "available to any person" (5 U.S.C. 552(a)(3)), and a large percentage of FOIA requests are made by firms and individuals acting in a representative capacity precisely so that the identity of the person, company, or organization seeking the information will not be known. For these reasons, "at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies." *EPA* v. *Mink*, *supra*, 410 U.S. at 86. Accordingly, in *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149, this Court held that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." The Court carefully emphasized (*id.*, at 149 n. 16) that "it is not sensible * * * to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." Rather, the question is whether the information sought would " 'routinely be disclosed' in private litigation" (*ibid.*, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess 10 (1966)).

Applying this teaching to the question presented by the instant case yields a result precisely opposite to that reached by the court of appeals. Of course, if the work-product privilege is perpetual in the context of civil dis-

covery, then work product from terminated litigation would not be available under the FOIA regardless of whether there was any potential for related litigation. But even if, as the court below suggested (App. A, *infra*, 4a), "the work-product privilege extends to subsequent cases only when they are related," it would not follow that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists" (*id.* at 7a; emphasis in original). On the contrary, if work-product from terminated litigation would not be discoverable in a related civil case, because of the absence of a showing of need, then that material would not " 'routinely be disclosed' in private litigation" (*NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149 n.16, quoting H.R. Rep. No. 1497, *supra*, at 10) and it would consequently be unavailable under the FOIA.

Moreover, the test imposed by the court of appeals' decision—whether "litigation related to the terminated actions exists or potentially exists" (App. A, *infra*, 7a)—is ambiguous and unworkable. First, it is far from clear what is meant by "related" litigation. Cases may be related in countless ways. For example, they may involve similar facts; the same or similar investigative techniques, causes of action, or defenses; or the same investigators, trial attorneys, or supervisory personnel. There are also infinite degrees of relatedness. For instance, all cases brought by a particular agency are related in an important sense, and disclosure of work product from an agency's past cases may provide a regulatee or potential litigant with valuable information about the agency's investigative and litigative techniques. Thus, the court of appeals' decision imposes upon the federal agencies and ultimately the courts the difficult task of

determining what sort of relationship is required and just how close the relationship between cases must be to fall within the court of appeals' construction of Exemption 5. Developing those standards is likely to take many years and much litigation, and applying them to the thousands of FOIA requests filed each year will be a truly burdensome chore. Even if it were clear what is meant by "related" litigation, it would still be necessary for those charged with processing FOIA requests to survey all cases pending in all courts in order to determine whether any "related" cases exist.

While the concept of "related litigation" is ambiguous, the concept of litigation that "potentially exists" is meaningless for all practical purposes. In our litigious society, what sort of litigation does not "potentially" exist at any time? In addition, the very fact of a FOIA request seeking information from government litigation files provides some reason for believing that there is a potential for related litigation. Furthermore, the obligation of proving the potential for related litigation might in some circumstances require the government to disclose the existence of sensitive investigations. Indeed, FOIA requests might be filed for the purpose of ascertaining whether any such investigations are then under way.

2. The apparent premise of the court of appeals' ruling—that the work-product privilege terminates unless related litigation exists or potentially exists—is without judicial precedent, unworkable, and contrary to the holdings of all courts of appeals that have decided the question.

The rationale underlying the work-product privilege was set forth in *Hickman* v. *Taylor*, *supra*. The Court recognized (329 U.S. at 511) that allowing the discovery of facts and documents assembled by attorneys in

preparation for litigation would grievously harm the adversary process:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Although *Hickman* was not concerned with an attempt to secure work-product for use in subsequent, unrelated litigation, the courts of appeals that have reached this issue have all recognized that the *Hickman* rationale remains applicable when work-product from terminated litigation is sought through discovery in a subsequent case. *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977) ("The mischief engendered by allowing discovery of work product recognized in *Hickman* would apply with equal vigor to discovery in future, unrelated litigation"); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 n.15 (4th Cir. 1973) (the conclusion that the work-product privilege survives "only if the two cases are 'closely related' * * * is incompatible with the essential basis of the *Hickman* decision"); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975); *Duplan Corp.* v. *Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976); *United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977). In all, five decisions by three different Circuits (the Fourth, Sixth, and Eighth) have concluded that the work-product privilege remains in force after the conclusion of the litigation for which the material was pre-

pared and without regard to the existence or potential existence of related litigation.[5]

The reasoning of the court below in refusing to follow the prior decisions of three other circuits is also unsound. While acknowledging that disclosure of work-product assembled for pending litigation would have deleterious effects, the court reasoned (App. A, *infra*, 6a) that "[w]hen litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish." The court thus agreed that an attorney will hesitate to commit matters to writing if they may be used against him by his immediate adversary, but it believed that the attorney will have no such inhibitions if the same materials may be used against him by a future adversary in an "unrelated" case. This is not sensible. Rather, as the Fourth, Sixth, and Eighth Circuits have recognized, if work-product prepared in connection with terminated litigation were freely discoverable in subsequent, "unrelated" litigation, much of what the Court sought to prevent in *Hickman* would take place. Attorneys would be more reluctant to amass materials that reflect unfavorably upon their clients for fear that those materials might be used to their clients' disadvantage in subsequent litigation or in some

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[5] Moreover, the perpetual nature of the work-product privilege is an implicit premise of this Court's analysis in *NLRB* v. *Sears, Roebuck & Co.*, *supra*. In that case, Sears filed a FOIA request seeking, among other things, intra-agency memoranda of the NLRB directing the filing of a complaint. Many such memoranda pertained to "cases which had been closed * * * because litigation before the Board had been completed" (421 U.S. at 145). However, the Court did not distinguish between open cases and closed cases but rather concluded (*id.* at 159-160) that all such memoranda had been "prepared in contemplation of the upcoming litigation [and therefore fell] squarely within Exemption 5's protection of an attorney's work product."

other way. Attorneys would be hesitant to commit to writing candid judgments that might cause them personal embarrassment if later disclosed. And potentially valuable files might be destroyed in many instances for the purpose of avoiding such disclosures.

The rule adopted by the court below would have a particularly adverse and demoralizing effect on government attorneys. The working papers of government attorneys would be subject to disclosure, not only in civil discovery, but under the FOIA as well. Yet government attorneys are far more dependent upon the existence of comprehensive written files than most of their counterparts in private practice: government cases tend to be larger and to last longer; government attorneys tend to be more transient; coordination of the positions taken in many varieties of cases is of unusual importance; and maintaining supervision and coordination in an organization as vast and complex as the United States government naturally requires great reliance upon past records. If the decision below is permitted to stand "much of what is now put down in writing would remain unwritten" (*Hickman* v. *Taylor*, *supra*, 329 U.S. at 511), and both the quality and consistency of government litigation is likely to suffer.

The court of appeals attempted to bolster its conclusion by relying upon what it characterized as a "substantial body of case law [that] supports the conclusion that the work-product privilege extends to subsequent cases *only when* they are related" (App. A, *infra*, 4a; emphasis added). However, none of the cases cited by the court reached that question. In each of those cases, the court declined to permit the discovery of attorney work-product in a subsequent, related case. See *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967); *Hercules, Inc.* v. *Exxon Corp.*, 434 F.Supp. 136,

153 (D.Del. 1977); *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 275 F.Supp. 146, 148 (E.D.Pa. 1967). Indeed, none of the cases even contains dictum embracing the court of appeals position.[6]

The remainder of the court of appeals' analysis is equally unpersuasive. The court stated (App. A, *infra*, 5a) that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." But simply because the privilege is qualified in one respect—*i.e.*, some privileged materials may be obtained in civil discovery where sufficient need is shown (see Fed. R. Civ. P. 26(b)(3))—it does not follow that the privilege must be qualified in every other respect as well. In other words, just because a court may conclude in a particular case that a litigant's need for privileged materials justifies disclosure, it does not follow that the interests served by the privilege lose all force "[w]hen litigation has ended and no potential for related actions exists" (App. A, *infra*, 6a). As we have explained (see pages 12-13, *supra*), those interests remain important.

Finally, the court observed (App. A, *infra*, 6a; emphasis in original):

> [W]e deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act request. Here, the presumption in favor of disclosure is at its zenith.

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[6] In *Republic Gear Co.*, the Second Circuit simply distinguished the case before it, which involved an attempt to obtain work-product from related cases pending on appeal, from district court cases involving work-product from completed litigation (381 F.2d at 557 & n.5). The three district court cases hold that work-product from previous, related cases is not discoverable. Those cases do not state that work-product from previous, unrelated cases is discoverable.

If the court meant by this statement to suggest that work-product privileged in civil discovery is nevertheless available under the FOIA despite Exemption 5, then the court's decision squarely contravenes both the plain language and legislative history of Exemption 5 and its construction by this Court (see *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149; *FOMC* v. *Merrill*, *supra*, 443 U.S. at 353).

3. The court of appeals' decision will prove particularly burdensome for the government because every withholding of agency records under the FOIA may be challenged in the District of Columbia Circuit. See 5 U.S.C. 552(a)(4)(B). Indeed, Department of Justice figures reveal that 38% of the FOIA suits brought in 1981 were filed in that Circuit.[7] Hence, the government cannot easily afford to await further development of this issue in other circuits. In these circumstances, this Court should grant review to consider whether the FOIA mandates the disclosure of vast quantities of the work-product of government attorneys.

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[7] A panel of the District of Columbia Circuit recently followed *Grolier* and remanded a FOIA suit to the district court to determine whether certain documents satisfied the *Grolier* test (*Moody* v. *IRS*, No. 81-2142 (D.C. Cir. June 25, 1982)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Argued Sept. 29, 1981

Decided Feb. 5, 1982

Before: WRIGHT, MACKINNON and WALD, Circuit Judges.

PER CURIAM:

Appellant Grolier filed suit under the Freedom of Information Act (FOIA)[1] seeking documents relating to a covert investigation of one of its subsidiaries, the Americana Corporation. Federal Trade Commission (FTC) lawyers prepared these documents as part of a civil penalty action filed against Americana in 1972 by the Department of Justice. *United States* v. *Americana Corp.*, Civil No. 388-72 (D. N.J.). The *Americana* action involved alleged misrepresentation in door-to-door sales and false advertising. The action was dismissed with prejudice on

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[1] 5 U.S.C. § 552 (1976).

November 17, 1976 after the FTC disobeyed a court order to turn over certain materials to the defendants.

In this FOIA case the District Court held that certain requested documents—Numbers 1, 3, 5, 6, and 7—constituted attorney work-product and that the FTC properly withheld them pursuant to Exemption 5[2] of the Freedom of Information Act.[3] *Grolier, Inc.* v. *FTC*, D. D.C. Civil Action No. 79-1215, Memorandum filed February 21, 1980 at 3, Joint Appendix (JA) 113; *Grolier, Inc.* v. *FTC*, D. D.C. Civil Action No. 79-1215, Memorandum filed June 13, 1980 at 2, JA 118.

There is no question that the documents involved were work-product prepared as part of the *Americana* action. Rather, the question on appeal is whether these documents continue to be privileged against disclosure several years after the *Americana* suit was terminated.

I. TEMPORAL SCOPE OF THE WORK-PRODUCT PRIVILEGE

Exemption 5 of FOIA "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). In the civil discovery context, however, there exists a "dispute among the courts as to * * * whether the protection afforded by the [work-product] privilege lapses once the litigation has ended or the prospects of litigation have faded[.]" *Coastal States Gas Corp.* v. *Dep't of Energy*,

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[2] *Id.* § 552(b)(5).

[3] Grolier has withdrawn its claim for disclosure of Document 2. As for Document 4, we affirm the District Court's judgment that the document was exempt from disclosure under Exemption 5 as an attorney-client communication.

617 F.2d 854, 865 (D.C.Cir.1980). Indeed, courts have followed three different approaches in deciding whether the work-product privilege extends beyond the termination of litigation.[4]

At one extreme, some courts have concluded that the work-product privilege applies only if the materials were prepared in anticipation of the very suit before the court; documents prepared for one case are thus freely discoverable in a different case. *E.g.*, *United States* v. *Internat'l Business Machines Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y.1974) (document must be prepared in anticipation of litigation in the case in which the special immunity accorded to such material is sought); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D.Pa.1970) (same); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 207 F.Supp. 407, 410 (M.D.Pa.1962) (materials must be prepared for the case at bar); *Gulf Construction Co.* v. *St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D.Tex.1959) (same); *Tobacco & Allied Stocks, Inc.* v. *Transamerica Corp.*, 16 F.R.D. 534, 537 (D.Del.1954) (same). At least one of these courts has noted that the seminal case of *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), involved materials prepared in anticipation of the litigation then before the court. *Gulf Construction Co.* v. *St. Joe Paper Co.*, *supra*, 24 F.R.D. at 415.

At the other extreme, some courts have held that there is "a *perpetual* protection for work product" extending beyond the termination of the litigation for which the

---

[4] Most cases dealing with this subject are from District Courts. Few discovery cases reach the appellate level because interlocutory orders are not appealable under the final order doctrine. Note, 1974 Duke L.J. 799, 817 n.95.

documents were prepared and reaching all subsequent suits. *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) (emphasis added). *Accord, Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483-484 (5th Cir. 1973) (rationale for work-product rule scarcely less applicable to a closed case than to one still being contested); *United States* v. *O.K. Tire Co.*, 71 F.R.D. 465, 468 n.7 (D.Idaho 1976); *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 43 (D.Md.1974).

A third, intermediate approach is that the extension of the work-product privilege from one case to a subsequent one turns on "whether the first action was complete and upon the relationship between the first and second actions." 4 J. Moore, Federal Practice ¶ 26.64[2] at 26-415 (2d ed. 1979). In the same vein, another leading commentator had found the "sounder view" to be that "documents prepared for one case have the same protection in a second case, *at least if the two cases are closely related.*" 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024 at 201 (1970) (emphasis added). *See* Cooper, *Work Product of the Rulesmakers*, 53 Minn.L.Rev. 1269, 1299 n.100 (1969) (view that privilege terminates is tenable "only when there is no danger of disclosure to others pursuing claims related to the claims involved in the litigation giving rise to the one-time work product materials").

A substantial body of case law supports the conclusion that the work-product privilege extends to subsequent cases only when they are related. *See, e.g., Republic Gear Co.* v. *Borg-Warner Co.*, 381 F.2d 551, 557 (2d Cir. 1967); *Hercules Inc.* v. *Exxon Corp.*, 434 F.Supp. 136 153 (D.Del.1977); *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y.1973). The paradigmatic situation situation is posed by *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 275

F.Supp. 146 (E.D.Pa.1967), where documents prepared in defense of a criminal antitrust action were found to be within the work-product rule in a subsequent civil antitrust suit.[5]

Extending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute.[6] *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511, 67 S.Ct. at 393. " '[B]ecause the privilege obstructs the search for truth and because its benefits are, at best, "indirect and speculative," it must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." ' " *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802-803 (3d Cir. 1979) (*quoting In re Grand Jury Proceedings (Sun Co.)*, 599 F.2d 1224, 1235 (3d Cir. 1979)).

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[5] This intermediate view is consistent with *Mervin* v. *FTC*, 591 F.2d 821 (D.C.Cir. 1975), which the dissent cites. In *Mervin* the plaintiff brought suit for disclosure of documents under the FOIA *and* for job reinstatement and damages on the basis that his dismissal was wrongful. *Id.* at 824. Mervin sought disclosure of documents prepared by government attorneys while defending an earlier suit for job reinstatement he had brought, which had been dismissed for failure to exhaust administrative remedies. *Id.* at 825. Thus the documents Mervin sought as part of his second suit for reinstatement were the government's work product from his first suit for reinstatement. The two actions were not merely closely related, they were identical.

[6] Indeed, courts extending the privilege to subsequent cases have often relied on the qualified nature of the privilege in doing so. *See, e.g., United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977) ("Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery * * *.").

The purpose of the privilege, as this court has made clear, "is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself * * *." *Jordan* v. *U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C.Cir.1978) (*en banc*) (emphasis in original; footnote omitted). Therefore, in order to fall within the scope of the privilege a document "*must* 'relate to the conduct of either ongoing or prospective trials; [it must] include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any on-going or prospective trial.' " *Exxon Corp.* v. *FTC*, 663 F.2d 120, 129 (D.C.Cir.1980) (emphasis added; brackets in original) (*quoting Jordan* v. *U.S. Dep't of Justice*, *supra*, 591 F.2d at 775-776).

When litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish. Indeed, "where the work-product materials in question were prepared for a distinct and prior * * * litigation, long completed, the policies underlying the work-product privilege have already been achieved." *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D.Fla.1977).

Moreover, we deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act request. Here, the presumption in favor of disclosure is at its zenith. "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). As this court wrote in *Mead Data Central, Inc.*

v. *U.S. Dep't of Air Force*, 566 F.2d 242, 259 (D.C. Cir.1977):

> The exemptions from the mandatory disclosure requirement of the FOIA are both narrowly drafted and narrowly construed in order to counterbalance the self-protective instincts of the bureaucracy which, like any organization, would prefer to operate under the relatively comforting gaze of only its own members rather than the more revealing "sunlight" of public scrutiny. Where there is a balance to be struck, Congress and the courts have stacked the scales in favor of disclosure and against exemption.
>
> * * * * * *

Accordingly, we hold that, in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists.

II. APPLICATION OF THE "RELATED LITIGATION" TEST

Grolier seeks documents prepared for the *Americana* action. Since that suit was dismissed with prejudice five years ago, it cannot be resurrected. Grolier is also a plaintiff in a Ninth Circuit case challenging an FTC order, but that case and order apparently are not related in any way to the *Americana* action. *See* FTC's "Statement of Material Facts as to Which There is No Genuine Issue," ¶ 9, JA 25. In addition, the FTC has long abandoned the covert investigation techniques discussed in the requested documents.

Under these circumstances, there does not appear to be any suit or potential suit related to the original *Americana* action. Nonetheless, since this issue has not been fully explored, we remand the case to the District Court

for reconsideration of the applicability of the work-product privilege in light of the apparent absence of related litigation. This judgment applies to Documents 3, 5, 6, and 7. With respect to Document 1, while we find that the work-product privilege may not apply, the document is still exempt from disclosure under Exemption 5 because it is clearly a pre-decisional document. *See Jordan* v. *U.S. Dep't of Justice*, *supra*, 591 F.2d at 774. Thus, the judgment of the District Court as to Document 1 is affirmed.

The dissent would affirm the District Court's judgment because it concludes that "the present [FOIA] suit could not be more directly related to the *Americana* litigation." Dissent at 4. While we agree that the work-product privilege extends to a second case *if* the second case is closely related to the first, *see id.* at 3 (*citing* C. Wright & A. Miller), Judge MacKinnon has, in our judgment, misapplied this test. Indeed, we find it illogical to use the filing of an FOIA suit as the sole basis for foreclosing appellant's access to the requested documents. Under the dissent's theory, any material that was work product at any time would never be disclosable under FOIA because the filing of the FOIA suit itself would constitute "related" litigation. We reject this strange view of the related litigation test.

The *Americana* suit was a civil penalty action involving misrepresentation in door-to-door sales and false advertising. The government's investigation and litigation strategy in such an action obviously would have little, if anything, to do with its strategy in defending this FOIA suit. The FOIA suit does not in any way relate to the substance of the earlier litigation. Thus, *for purposes of the work-product privilege*, the two cases are neither "closely related" nor even "related."

III. CONCLUSION

For the reasons given above, we affirm the judgment of the District Court as to Documents 1 and 4. However, we vacate the judgment of the District Court as to Documents 3, 5, 6, and 7, and remand the case for reconsideration of the applicability of the work-product privilege in light of the apparent absence of litigation related to the *American* suit.

So ordered.

MACKINNON, Circuit Judge (dissenting in part and concurring in part).

I concur in the Judgment insofar as it affirms the Judgment of the District Court with respect to Documents 1 and 4 but respectfully dissent from the vacation of the Judgment of the District Court with respect to Documents 3, 5, 6 and 7 and the remand to the District Court.

The majority opinion does not apply existing law. In my opinion the Judgment of the District Court as to Documents 3, 5, 6 and 7 should be affirmed on the ground that said documents are exempt from disclosure as the "working papers" of the attorneys and within the "attorney-client privilege" as reflected in the exemption set forth in 5 U.S.C. § 552(b)(5) ("Exemption 5") and because the termination of the litigation to which the work-product relates does not destroy this privilege. The majority opinion gives no credence to the "attorney-client privilege" of the work-product rule as embodied in Exemption 5.

The work-product rule was first articulated by the Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 512, 67 S.Ct. 385, 394, 91 L.Ed. 451 (1947). There the Court, dealing primarily with work-product, i.e., statements taken by attorneys from potential witnesses, said:

> the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system

> of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

Much later, the Supreme Court noted in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S.Ct. 1504, 1518, 44 L.Ed.2d 29 (1975) that the work-product rule was available to Government attorneys:

> It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law. . . . [The] case law clearly makes the attorney work-product rule of *Hickman* v. *Taylor* . . . applicable to Government attorneys in litigation. Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy.

Our opinion in *Mervin* v. *FTC*, 591 F.2d 821, 825 (D.C.Cir.1978) is to the same effect: (". . . it is clear that Exemption five includes the attorney work-product privilege").

The *Sears* opinion, by Justice White, also pointed out that the traditional "attorney-client privilege" was subsumed in the work-product rule carried into FOIA by Exemption 5:

> The Senate Report states that Exemption 5 "would include the working papers of the agency attorney *and documents which would come within the attorney-client privilege if applied to private parties*," S.Rep.No. 813, p. 2. . . .

421 U.S. at 154, 95 S.Ct. at 1518. (Emphasis added).

As the majority notes, the documents in question in the instant case clearly qualify as work-product. Majority at

2. Under the applicable rules, "[p]arties may obtain discovery regarding any matter, not privileged" and when discovery is ordered the court is admonished to "protect against disclosure of the mental expressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." F.R.Civ.P. 26. Documents 5, 6 and 7 are memoranda prepared by an attorney that reveal the attorney's thought processes in the preparation of the case.

Document 3 contains advice and instructions given by an attorney as to procedures that the Government should follow with respect to the preparation of certain aspects of the case. This is clearly the work-product of an attorney setting forth his mental processes, opinion and legal theory. It is also *clearly* within the traditional "attorney-client privilege." There is no question that it is protected from disclosure by Exemption 5.

My *in camera* inspection of the six documents involved in this case convinces me that they are *all* covered by the work-product rule, and, accordingly, by Exemption 5. There is *nothing* therein that is not work-product or that plaintiff would need to start a lawsuit.

The majority neatly sidesteps this point by saying, in essence, that even though the documents are *bona fide* work-product, the work-product rule and Exemption 5 are inapplicable insofar as no litigation related to the original *Americana* suit, *United States* v. *Americana Corp.*, Civil No. 388 72 (D.N.J.), is currently under way and the methods of obtaining evidence discussed in the documents have apparently been long since discontinued.

This argument is *not* supported by the facts or the law. It is sound case law that "documents prepared for one case have the same protection in a second case, at least if the two cases are closely related." C. Wright & A. Miller, Federal Practice and Procedure § 2024 at 200-201 (1970).

See Duplan Corp. v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 (4th Cir. 1971) (upon the termination of litigation the work-product documents of an attorney prepared incident thereto do not lose the qualified immunity extended to them under Rule 26(b)(3)); *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 557-58 (2d Cir. 1967) (documents prepared by non-party attorney in prior litigation are protected from adversary disclosure in subsequent litigation as attorney's work-product and by attorney-client privilege where documents reflected attorney's mental processes); *Philadelphia Electric Company* v. *Anaconda American Brass Co.*, 275 F.Supp. 146, 147 (E.D.Pa.1967) (documents prepared in defense of a criminal antitrust action are within the work-product rule in a subsequent civil action).

Other cases also hold that the work-product privilege as carried forth by Exemption 5 is not destroyed by the termination of initial litigation. In *Mervin* v. *FTC*, *supra*, wherein a former FTC employee sued unsuccessfully to force disclosure of documents related to an earlier suit for reinstatement, this court held that the work-product privilege may extend past the end of the litigation to which the work-product relates. *See also National Public Radio* v. *Bell*, 431 F.Supp. 509, 512 (D.D.C.1977) ("Despite plaintiff's unsupported contention that Exemption 5 protection 'disappear[s] when no further legal action is in prospect,' there can be no doubt but that the documents in question fall squarely within the protective scope . . . the exemption").

In the instant case, as the majority suggests, petitioner's request for disclosure relates directly to the FTC's April, 1973, investigation of Americana Corporation and Grolier Incorporated. That investigation resulted in *United States* v. *Americana Corporation*, *supra*, a civil

penalty action filed by the government. The suit was dismissed on November 16, 1976.

Petitioner, who was a co-defendant in the earlier *Americana* suit, now requests disclosure under FOIA of documentary material prepared, and advice given, by government counsel that related directly to strategy and tactics to be followed by the government in the *Americana* litigation. Contrary to the majority's remarkable assertion that "the two cases are neither 'closely related' nor even 'related'," Majority at 9, the present suit could not be more directly related to the *Americana* litigation. The work-product privilege as embodied in Exemption 5, inclusive of the "attorney-client privilege [as] applied to private parties," would even in the majority's judgment, have applied in *Americana*. Therefore, it properly extends to the instant case as well. The majority attempts to divert attention from this most obvious of conclusions by decrying the fact that according to such a finding, "any material that was work product at any time would never be disclosable under FOIA because the filing of the FOIA suit itself would constitute 'related' litigation." At 557. This lament bespeaks a fundamental failure to grasp the *raison d'etre* of Exemption 5. It was precisely to protect *bona fide* work product and privileged attorney-client matter from the likes of FOIA requests that Exemption 5 was enacted in the first place. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518; *Mervin* v. *FTC*, 591 F.2d at 825. A FOIA request such as is made in the instant case is the typical "related" litigation contemplated by the statute. As such, it is properly turned away on Exemption 5 grounds.

The requested material is thus exempt as expressing the attorney's thoughts and stategies,[1] and because the ideas expressed constitute *privileged* advice by an attorney to his client, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518. I would accordingly affirm the Judgment of the District Court in all respects and hold that the documents are exempt from disclosure under 5 U.S.C. § 552(b)(5).

---

[1] The analysis of the majority places great weight on the fact that "[t]he government's investigation and litigation strategy in such an action obviously would have little, if anything, to do with its strategy in defending this FOIA suit." At 557. I am hard pressed to glean how this point bears the slightest relevance to this proceeding. The relative strategies in the two suits in question are immaterial in this inquiry. *All* we are concerned with here is that the strategies in the *original Americana* litigation were *bona fide* work product. That they constitute *privileged* advice by an attorney to his client, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518. I would accordingly affirm the Judgment of the District Court in all respects and hold that the documents are exempt from disclosure under 5 U.S.C. § 552(b)(5).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Before: WRIGHT MACKINNON and WALD, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this case is affirmed in part, vacated in part, and the case is remanded for further proceedings in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 5, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Before: WRIGHT MACKINNON and WALD, Circuit Judges

ORDER

On consideration of appellees' petition for rehearing, filed March 22, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
For the Court

GEORGE A. FISHER, Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge MacKinnon would grant the petition for rehearing.

Filed April 7, 1982

ORDERED

It is ORDERED by the Court, *sua sponte*, that the panel order of April 7, 1982 is amended by making the attached statement a part thereof.

Per Curiam
For the Court

GEORGE A. FISHER, Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Statement of Circuit Judges Wright and Wald on Petition for Rehearing

The opinion of the majority addressed the applicability of the work-product privilege as incorporated in Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1976). Exemption 5 also encompasses material that is part of the deliberative process within a government agency. *Taxation With Representation Fund* v. *IRS*, 646 F.2d 666, 676-677 (D.C. Cir. 1981); *Mead Data Central, Inc.* v. *Dep't of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). The government has never at any stage of the proceedings, including its application for rehearing and its suggestion for rehearing *en banc*, raised the deliberative process privilege with respect to Documents 3, 5, 6, and 7, the documents subject to remand and potential release. With respect to these documents the government has relied solely on the work-product privilege. *See* Index to Documents, *Grolier, Inc.* v. *FTC*, D. D.C. Civil Action No. 79-1215, at 3-4 (Joint Appendix 62-63). Thus the majority opinion did not address the applicability of the deliberative process privilege to these documents, and we do not now.

Filed April 10, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Before: ROBINSON, Chief Judge, WRIGHT, TAMM, MACKINNON, ROBB, WALD, MIKVA, EDWARDS, GINSBURG and BORK, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court and a majority of the judges have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
For the Court

GEORGE A. FISHER, Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Tamm, MacKinnon, Robb and Ginsburg would grant the suggestion for rehearing *en banc*. Circuit Judges Mikva and Bork did not participate in this order.

Filed April 7, 1982

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 79-1215

GROLIER INCORPORATED, a Corporation, PLAINTIFF,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, DEFENDANTS.

MEMORANDUM

This is a Freedom of Information Act ("FOIA") case. The defendants claim that exemption (b)(5) of the FOIA, 5 U.S.C. § 552(b)(5) permits nondisclosure of seven withheld documents. On February 21, 1980, the court released a memorandum opinion addressing cross-motions for summary judgment. That opinion granted summary judgment on behalf of the defendants with respect to documents numbered 1, 2, and 4. But the court ordered *in camera* inspection for the remaining four documents. The court herein grants summary judgment on behalf of the defendant with respect to documents numbered 3, 4, 6, and 7.

The February 21, 1980 opinion noted that exemption 5 encompasses both the privilege for confidential agency memoranda and the attorney-client and work-product privileges. The FTC claims work-product pursuant to the

four documents presently at issue. The February 21 opinion further noted:

> The court questions whether these documents qualify as work product. That evaluations, opinions, recommendations and thought processes can constitute work product is beyond dispute. But the key to the work product privilege is whether the FTC prepared such documents "with an eye toward litigation, *Hickman* v. *Taylor*, *supra*, at 394, or "in anticipation of litigation or for trial." Federal Rule of Civil Procedure 26(b)(3). As stated by Professor Wright:
>
> > Prudent parties anticipate litigation and begin preparation prior to the formal commencement of an action. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.
>
> C. Wright, *Law of Federal Courts*, § 82 at 408-09 (1976).
>
> It is unclear from the *Vaughn* index whether the FTC prepared the documents at issue with an eye toward the Americana litigation. The court therefore orders the FTC to produce these documents for *in camera* inspection. The Supreme Court in *EPA* v. *Mink*, *supra* at 93, expressly approved of this procedure. It noted that "if it [the agency] fails to meet its burden without *in camera* inspection, the District Court may order such inspection."

Opinion at 4-5.

The court's *in camera* review of these materials reveals that they fall within the parameters of the work-product privilege. Three of the four documents inspected—numbered 3, 6, and 7—refer directly to the Americana litigation. The fourth, document number 5, indirectly refers to the civil action employing the term "matter."

The four documents encompass opinions by attorneys regarding the evidentiary needs of the Americana action. They also discuss specific methods of obtaining evidence in that litigation. Accordingly, the documents fall within the rubric of "mental impressions, conclusions, opinions or legal theories," Rule 26(b)(3), of the case.

There is also little question that the FTC prepared these documents "with an eye toward litigation." *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947). Stated otherwise, the "document[s] can fairly be said to have been prepared or obtained because of the prospect of litigation." C. Wright, *Law of Federal Courts*, § 82 at 409 (1976). In fact, the FTC prepared the documents at issue pursuant to an ongoing civil penalty action. The documents therefore constitute work product; the FTC properly withholds these memoranda pursuant to exemption five of the FOIA. 5 U.S.C. § 552(b)(5).

An appropriate Judgment accompanies this Memorandum.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States District Judge

Dated: 6-12-80

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Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-372

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL.,
Petitioners

v.

GROLIER INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI GRANTED NOVEMBER 8, 1982.

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GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

DATE	FILINGS—PROCEEDINGS
(E) 08-11-80	Copy of notice of appeal and docket entries from Clerk, District Court (n-2)
(E) 08-11-80	Docketing fee was paid in District Court on 08-07-80
(C) 08-22-80	Certified Original Record (1 vol.) (n-3)
(T) 09-24-80	4-Appellant's motion for leave to file motion to extend time to file brief (m-24)
(B) 10-02-80	Order per CJ Wright granting appellant's motion for leave to file motion to extend time to file brief
(B) 10-02-80	4-Appellant's motion to extend time to file brief 12-1-80 (m-24)—GRANTED
(T) 11-25-80	4-Appellant's motion for leave to file motion to extend time to file brief (m-25)
(T) 12-05-80	Clerk's order granting appellant's motion for leave to file motion to extend time to file brief to and including January 5, 1981
(T) 12-05-80	4-Appellant's motion to extend time to file brief —granted
(D) 1-5-81	4-Appellant's motion for leave to proceed under Rule 30(c), deferred appendix (m-5)
(D) 1-5-81	4-Appellant's brief (m-5)
(T) 01-13-81	Clerk's order granting the parties leave to proceed under Rule 30(c)
(T) 01-27-81	4-Appellees' motion to extend time to file brief to March 11, 1981 (m-27)

DATE	FILINGS—PROCEEDINGS

(C) 02-06-81 Clerk's order granting appellees' motion to extend time to file brief to 3/11/81

(C) 03-09-81 4-Appellees' motion for leave to file motion to extend time to file brief (m-9)

(B) 03-12-81 Clerk's order granting appellee's motion for leave to file motion to extend time to file brief

(B) 03-12-81 4-Appellee's motion to extend time to file brief to 4-1-81 (m-9)—GRANTED

(T) 03-30-81 4-Appellees' motion for leave to file motion to extend time to file brief (m-30)

(B) 04-03-81 Clerk's order granting appellees' motion for leave to file motion to extend time to file brief to 4-10-81

(B) 04-03-81 4-Appellees' motion to extend time to file brief to 4-10-81—GRANTED

(T) 04-10-81 3-Appellees' brief (m-10)

(T) 04-20-81 4-Appellant's motion to extend time to file reply brief to May 27, 1981 (m-20)

(B) 05-01-81 Clerk's order that the time for filing appellant's reply brief is extended to and including May 27, 1981. The appendix of the parties shall be filed 7 days after appellant's reply brief and the printed briefs of the parties shall be filed 14 days thereafter.

(T) 05-01-81 7-Joint Appendix (p-1)

(V) 05-27-81 15-Appellant's opening brief (m-26)

(V) 05-27-81 15-Appellant's reply brief (m-26)

(V) 06-03-81 15-Appellees' brief (m-3)

(B) 07-23-81 Clerk's order, sua sponte, that the following times are allotted for the oral argument of this case: Appellant—20 minutes; Appellees—20 minutes.

DATE	FILINGS—PROCEEDINGS

(B) 09-29-81 Argued before Wright, MacKinnon * and Wald, CJ's. On motion of Mr. Meiser, Mr. Mason, a member of the bar of the Supreme Court of California was allowed to argue pro hac vice for appellant.

(S) 02-04-81 Opinion per curiam

(S) 02-04-82 Opinion dissenting in part and concurring in part filed by Circuit Judge MacKinnon

(S) 02-04-82 Judgment that the judgment of the District Court is affirmed in part, vacated in part, and the case is remanded, in accordance with the opinion

(C) 02-19-82 4-Appellants' bill of costs (m-18)

(S) 02-25-82 Per Curiam order that the opinion for the Court filed on February 5, 1982 in this case is amended; see order for details

(V) 03-22-82 15-Appellees' petition for rehearing and suggestion for rehearing en banc (m-22)

(V) 03-26-82 1-Letter from counsel for appellant advising of change of firm name & address (m-2)

(V) 04-07-82 Per Curiam order that appellee's petition for rehearing filed March 22, 1982 is denied; Wright, MacKinnon and Wald, CJs. (Circuit Judge MacKinnon would grant the petition for rehearing.

(V) 04-07-82 Per Curiam order, en banc, that appellees' suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva (who did not participate), Edwards, Ginsburg and Bork (who did not participate), CJs. (Circuit Judges Tamm, MacKinnon, Robb and Ginsburg would grant the suggestion for rehearing en banc)

(B) 04-09-82 Per Curiam order, sua sponte, that the panel order of April 7, 1982, is amended by making the attached statement a part thereof; Wright and Wald, CJ's (See order for attached "Statement of Circuit Judges Wright and Wald on Petition for Rehearing").

DATE	FILINGS—PROCEEDINGS

(G) 04-14-82 4-Appellees' motion to stay issuance of mandate (m-14)

(C) 05-17-82 4-Appellees' (Fed.) motion to stay issuance of mandate (m-17)

(V) 05-27-82 Per Curiam order that appellees' motions to stay issuance of the mandate are partially granted and the Clerk is directed not to issue the mandate herein for a period of 30 days from the date of this order; Wright, MacKinnon and Wald, CJs (Judge MacKinnon would grant a stay of mandate for a period of 60 days from the date of this order)

(B) 05-27-82 4-Appellant's opposition to motion to stay issuance of mandate (m-24)

(C) 06-09-82 Letter from counsel for appellant advising that appellant's opposition to motion to stay was mailed on May 24, 1982

(B) 06-25-82 4-Appellees' (federal) motion to stay issuance of mandate (m-24)

(C) 06-30-82 4-Appellant's opposition to appellees' motion to stay issuance of mandate (m-28)

(C) 07-01-82 4-Appellees' reply to opposition to motion to stay mandate (m-1)

(C) 07-23-82 4-Appellees' (Fed) motion to stay issuance of mandate (m-23)

(V) 07-27-82 Per Curiam order that appellees' motion to stay issuance of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of 30 days from the date of this order; Wright, MacKinnon and Wald, CJs

(C) 08-05-82 Copy of letter from Clerk, SC extending time to file petition for writ of certiorari to 9/4/82 in SC No. A-1122 on August 3, 1982

(B) 08-26-82 4-Appellees' (fed.) motion to stay issuance of mandate (m-26)

DATE	FILINGS—PROCEEDINGS

(B) 09-08-82 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed on 09-02-82 in SC No. 82-372

(V) 09-23-82 Per Curiam order that appellees' motions to stay issuance of mandate are granted and the Clerk is directed not to issue the mandate herein pending final disposition of this case by the Supreme Court; Wright, MacKinnon and Wald, CJs

(T) 11-09-82 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-372 on 11-08-82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 79-1215

Date	Proceedings
1979	
May 3	COMPLAINT: Exhibits A thru D; appearance.
May 3	SUMMONS (7) and copies (7) of complaint issued. U.S. Atty ser 5-4-79 Defts. ser 5-9-79
June 5	ANSWER by deft. to complaint.
June 5	CALENDARED. CAL/N.
Jul 9	STATUS CALL. Motion of deft. for summary judgment and indexing by 8-20-79; pltff. given until 9-10-79 for reply; parties to indicate on the pleadings if they wish an oral hearing. (Rep. Dennis Bossard) Flannery, J.
Jul 11	ORDER filed July 10, 1979 directing that defts. file a Vaughn index and motion for summary judgment by 8-20-79; pltff. file cross-motion for summary judgment or other appropriate response by 9-10-79. (N) Flannery, J.
Aug 17	MOTION by defts. for enlargement of time to file its dispositive motion.
Aug 22	ORDER filed Aug. 21, 1979 directing that deft. will have until 9-17-79 to file their dispositive motion; pltff. will have until 10-8-79 to file opposition. (N) Flannery, J.
Sept 14	MOTION (second) of defts. for enlargement of time within which to file a dispositive motion.
Sept 20	ORDER filed Sept. 19, 1979 extending defts. time to and including 10-5-79 to file dispositive motion and pltff. will have to and including 10-26-79 to file any opposition. (signed 9-18-79) (N) Gasch, J.
Oct 5	THIRD MOTION by defts. for enlargement of time to file dispositive motion.

Date	Proceedings
1979	
Oct 10	MOTION by defts. for dismissal or, in the alternative, for summary judgment; statement; P&A; affidavits (12); index to documents; attachments (4). "Let this be filed." (FIAT) Flannery, J.
Oct 11	ORDER filed Oct. 10, 1979 that defts. will have until Oct. 9, 1979 within which to file their dispositive motion. (signed 10-9-79) (N) Flannery, J.
Oct 22	MOTION by pltff. for extension of time to respond to defts. motion for dismissal or, in the alternative, for summary judgment.
Oct 24	ORDER filed Oct. 23, 1979 granting extension of time to 11-2-79 for pltff. to respond to defts. motion for dismissal or, in the alternative, for summary judgment. (N) Flannery, J.
Oct 30	AMENDED motion by pltff. for extension of time to respond to defts. motion for dismissal or, in the alternative, for summary judgment.
Nov 6	ORDER filed Nov. 2, 1979 extending time until 11-9-79 for pltff. to respond to defts. motion for dismissal or, in the alternative for summary judgment. (N) Flannery, J.
Nov 9	THIRD motion by pltff. for extension of time to respond to defts. motion for dismissal or, in the alternative, for summary judgment.
Nov 14	ORDER FILED Nov. 13, 1979 extending time until 11-16-79 for pltff. to respond to defts. motion for dismissal or, in the alternative, for summary judgment. (N) Flannery, J.
Nov 15	CROSS-MOTION by pltff. for partial summary judgment and opposition to motion of defts. for dismissal or, in the alternative, for summary judgment; statement; table of contents; table of cases; P&A; Exhibit A.

Date	Proceedings
1980	
Feb. 22	MEMORANDUM filed 2-21-80. (N) FLANNERY, J.
Feb. 22	JUDGMENT & ORDER filed 2-21-80 that judgment be entered on behalf of the defts. with respect to documents number 1, 2, and 4 and that the defts. submit documents number 3, 5, 6 and 7 for in camera review before 3-5-80. (N) FLANNERY, J.
May 20	MOTION of pltf. for production of documents; P & A; attachment.
Jun 13	MEMORANDUM (N) FLANNERY, J.
Jun 13	JUDGMENT entered on behalf of detfs [sic] with respect to documents numbered 3, 5, 6 & 7 dismissing this case. (N) (JS6 case closed) (Signed 6-12-80) FLANNERY, J.
Aug 7	NOTICE OF APPEAL of pltf for judgment entered on 2-21-80 and 6-13-80; $5.00 USDC fee and $65.00 USCA fee paid & credited to the U.S. Treasury; copies mailed to Lilliam A. McEwen.
Aug 8	COPIES of docket entries & notice of appeal transmitted to USCA. USCA # 80-1939.
Aug 21	RECORD ON APPEAL delivered to USCA. Receipt acknowledged

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 79-1251

May 3, 1979

GROLIER INCORPORATED, a corporation,
Old Sherman Turnpike,
Danbury, Connecticut, PLAINTIFF

v.

FEDERAL TRADE COMMISSION; MICHAEL PERTSCHUK, Chairman; PAUL RAND DIXON, Commissioner; DAVID M. CLANTON, Commissioner; and ROBERT PITOFSKY, Commissioner, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF UNDER THE FREEDOM OF INFORMATION ACT

Plaintiff Grolier Incorporated complains of the above-named defendants as follows:

I

Jurisdiction And Venue

1. This Court has jurisdiction over the subject matter of this action pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(4)(B), and Sections 1331 and 1361 of the Judicial Code, 28 U.S.C. §§ 1331 and 1361. Venue is properly laid in the District of Columbia,

the judicial district in which the defendants reside and in which the cause of action has arisen, pursuant to 28 U.S.C. § 1391(e).

II

The Parties

2. Plaintiff Grolier Incorporated (hereinafter "Grolier") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located in Danbury, Connecticut. Grolier owns and holds all the outstanding stock of each and every other corporation designated in Specification 2 of its Freedom of Information Act Request dated June 28, 1978 (attached hereto as Exhibit A). Plaintiff Grolier and each and every other corporation named in Specification 2 of its Request are appellants in a proceeding currently pending before the United States Court of Appeals for the Ninth Circuit to review an order entered by defendant Federal Trade Commission, entitled *Grolier Incorporated v. Federal Trade Commission*, No. 78-2159.

3. Defendant Federal Trade Commission (hereinafter "FTC") is an independent regulatory agency of the United States Government, organized and existing pursuant to Section 1 of the Federal Trade Commission Act, 15 U.S.C. § 41. The FTC is subject to the document disclosure provisions of the Freedom of Information Act, 5 U.S.C. § 552.

4. Defendant Michael Pertschuk is a member and Chairman of defendant FTC, and defendants Paul Rand Dixon, David M. Clanton and Robert Pitofsky are members of defendant FTC, each having been duly appointed by the President, and each having taken oath and entered upon the duties of a member of the Commission; pursuant to statute they are duly qualified and voting members of the FTC.

III

Nature Of The Controversy

5. By a complaint dated March 9, 1972, the FTC commenced an administrative adjudicative proceeding against plaintiff Grolier and fourteen of its wholly-owned subsidiaries. The short title of that administrative proceeding is "*In the Matter of Grolier Incorporated*, Docket No. 8879."

6. The complaint in the above-mentioned proceeding before the FTC charges Grolier and its subsidiaries with a variety of unfair and deceptive acts and practices in commerce. An Order and Opinion of the Commission was issued by the FTC on March 13, 1978.

7. On or about June 20, 1978, counsel for Grolier Incorporated, Furth, Fahrner & Wong, attempted to obtain, by a written request, pursuant to 5 U.S.C. § 552 and § 4.11 of defendant FTC's Rules of Practice, a number of records and documents referring or relating to any covert investigations (as defined therein) of Grolier or its subsidiaries conducted by defendant FTC. A photocopy of plaintiff Grolier's Freedom of Information Act Request (hereinafter "FOIA request") is attached hereto as Exhibit A, and is incorporated herein by reference.

8. Defendant FTC responded to plaintiff's FOIA request by a letter dated July 12, 1978, from the Secretary of defendant FTC to plaintiff's counsel. A photocopy of this letter in response is attached hereto as Exhibit B, and is incorporated herein by reference. It stated in substance that plaintiff's FOIA request was denied; no information responsive to Specifications 1 and 2 was located; and Specification 3 was alleged to be unreasonably burdensome and the few documents which were found were alleged to be exempt from mandatory disclosure pursuant to 5 U.S.C. § 552(b)(5) relating to inter-agency or intra-agency memoranda.

9. On or about August 3, 1978, pursuant to § 4.11(a)(2) of defendant FTC's Rules of Practice, plaintiff ex-

hausted its administrative remedy by taking an appeal to defendant FTC's General Counsel from the initial determination denying access to certain of the requested records. Plaintiff's administrative appeal was based on the grounds that none of the records withheld are exempt from disclosure under the Freedom of Information Act and that the Commission would not be unreasonably burdened if it were required to conduct a reasonable search for records described in the third specification of plaintiff's FOIA request. In the alternative—and in the event defendant FTC decided to deny the administrative appeal on the exemption grounds—plaintiff requested defendant FTC to exercise its discretion to release the withheld records, and in that connection advised defendant FTC that plaintiff was one of the respondents in the abovementioned adjudicative proceeding (Docket No. 8879), and that plaintiff believed that such records may have some bearing on certain issues raised in that proceeding. A photocopy of plaintiff's letter of appeal is attached hereto as Exhibit C, and is incorporated herein by reference.

10. By letter dated October 12, 1978, from the General Counsel of defendant FTC to plaintiff's counsel, defendant FTC advised plaintiff that the administrative appeal was granted as to certain documents and denied as to others. General Counsel of defendant FTC advised plaintiff that one "covert" investigation had been located involving a civil penalty action brought against the Americana Corporation in 1972 by the Justice Department. Defendant FTC denied disclosure of documents related to this covert investigation on the grounds of an exemption from FOIA disclosure covering "internal Commission memorandum." Defendant FTC also denied plaintiff's request for a reasonable search for records described in the third specification of plaintiff's FOIA request on the grounds that such specification "does not come within the

definition of identifiable records as outlined by either § 552(a)(3) of the FOIA or § 4.11(ii) of the FTC's Rules of Practice." A photocopy of the General Counsel's letter is attached hereto as Exhibit D, and is incorporated herein by reference.

V

Offenses Charged

11. Defendants have committed the following violations of law in processing plaintiff's FOIA request:

a. Defendants have erroneously claimed an exemption for, and have refused to produce, certain requested records which are not protected by any recognized exemption, in violation of the FOIA; and

b. Defendants have failed to advise plaintiff of the identity and existence of all the requested records, and precisely which of the requested records are claimed to be exempt from production and which are not; this failure constitutes a violation of 5 U.S.C. § 552(a)(6)(A)(i), which requires defendant FTC to "notify" a person making an FOIA request of its determination "whether to comply with such request" and "the reasons therefor."

Demand for Relief

WHEREFORE plaintiff requests that this Court:

A. Render a declaratory judgment adjudicating that all documents which plaintiff has requested in Specifications 1 and 2 of its FOIA request are not exempt from disclosure and must therefore be produced to plaintiff;

B. Issue an injunction, prohibiting defendants from withholding the requested records, and commanding defendants to produce all records which have been improperly withheld from plaintiffs;

C. Assess against the United States Government the reasonable attorneys' fees and other litigation costs which plaintiff has incurred in bringing this action; and

D. Grant plaintiff such other and further relief as the Court may deem just and proper in the premises.

DATED: May 2, 1979
San Francisco, California

FREDERICK P. FURTH
THOMAS R. FAHRNER
BRUCE J. WECKER
FURTH, FAHRNER & WONG
235 Montgomery Street, Suite 1330
San Francisco, California 94104
Telephone: (415) 433-2070

By /s/ [Illegible]
SAMUEL H. SEYMOUR
RENE A. TORRADO, JR.
SEYMOUR & DUDLEY
1901 L. Street, N.W.
Washington, D.C. 20036
Telephone: (202) 452-1711

By _____

EXHIBIT A

LAW OFFICES
FURTH, FAHRNER & WONG
Russ Building, Suite 1330
San Francisco, California 94104
Telephone (418) 433-2070
Cable Bengoshi San Francisco

June 20, 1978

Freedom of Information Act Request
Office of the Secretary
Federal Trade Commission
Washington, D.C. 20580

To The Commission:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended, and pursuant to § 4.11 of the Commission's Rules of Practice, we hereby request, on behalf of our client Grolier Incorporated, that the Commission make promptly available to us for inspection and copying the following records and documents:

1) All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid; and

2) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any of the following companies:

a) Grolier Incorporated
b) Grolier Interstate, Inc.
c) Americana Corporation
d) Spencer International Press, Inc.
e) R. H. Hinckley Company

f) The Richards Company
g) Grolier Society, Inc.
h) Madison Enterprises, Inc.
i) Grolier New Era Corporation
j) Grolier Enterprises, Inc.
k) Grolier Reading Programs, Inc.
l) Career Institute, Inc.
m) Americana Interstate, Inc.
n) American People's Press, Inc.

3) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any person, company or other entity.

As used in the three preceding paragraphs, the phrase "covert investigation" refers to any investigation of which the subject entity was not notified in advance and prior to acts taken pursuant to such investigation.

Pursuant to § 4.11(a)(1)(i)(c) of the Commission's Rules of Practice, we hereby specifically advise you that we are willing to pay, in accordance with § 4.8(c) of the Commission's Rules, whatever fees may be charged for processing this Freedom Of Information Act request. No waiver of fees is requested.

Very truly yours,

FURTH, FAHRNER & WONG

By /s/ [Illegible]
Counsel for
Grolier Incorporated

FPF:szb

CC: Richard M. Clark, Esq.

EXHIBIT B

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the Secretary

July 12, 1978

Frederick P. Furth, Esquire
Furth, Fahrner & Wong
Russ Building, Suite 1330
San Francisco, California 94104

Re: Freedom of Information Act Request
Grolier Society, Inc.
D. 8879

Dear Mr. Furth:

This is in response to your letter of June 20, 1978 requesting information concerning the above.

We have no information responsive to Specification 1 of your request. Mr. Wendell A. Reid was an employee of our New York Regional Office until April 22, 1977. When Mr. Reid left the Commission he either took his personal files or they were destroyed. The official files of that office do not indicate that Mr. Reid was assigned to any matters related to Grolier.

Three investigations of the companies listed in Specification 2, Grolier Society, Inc., D. 8879, Grolier Society, Inc., C. 753, and Grolier Incorporated, C. 2189, were located. A careful search of the files in these matters failed to locate any information related to "covert investigations".

Section (a) (3) (A) of the act requires that information being sought must be reasonably identified. This section of the act also requires that a request be specific enough to allow the location of the records being sought without an unreasonable burden being placed on the agency. Your

third specification would require a search of the millions of documents contained in every investigatory file in the Commission. This would be an unreasonable burden. However, we have discussed this matter with knowledgeable persons in the Commission. These discussions have identified a few documents which are responsive to your request. These documents will not be released to you because they are exempt from mandatory disclosure pursuant to 5 U.S.C. Section 552:

> (b) (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

You may petition the Commission for access to the material which is being withheld within thirty (30) days. You may petition either because you believe that the material is not exempt under the law, or because you believe that the Commission should exercise its discretion and release the information notwithstanding its exempt status. If requesting discretionary release, you should state your interest in the subject matter and the purpose for which it would be used if access is granted. The request should be addressed Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Please include a copy of your original letter and this response with your appeal.

The undersigned is deemed the sole official responsible for the denial of your request.

Sincerely,

/s/ Carol M. Thomas
CAROL M. THOMAS
Secretary

EXHIBIT C

LAW OFFICES
FURTH, FAHRNER & WONG
Russ Building, Suite 1330
San Francisco, California 94104
Telephone (415) 433-2070
Cable Bengoshi San Francisco

August 3, 1978

Freedom Of Information Act Appeal
Office of the General Counsel
Federal Trade Commission
Sixth and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Sir:

Pursuant to Section 4.11(a)(2) of the Commission's Rules, we hereby appeal the Commission's denial of our Freedom of Information Act request. A copy of our request, dated June 20, 1978, is attached as Exhibit A, and a copy of the Secretary's response, dated July 12, 1978, is attached as Exhibit B.

The Secretary's letter of July 12, 1978 states that the Commission has "identified a few documents which are responsive to [our] request", but that such documents "will not be released . . . because they are exempt from mandatory disclosure" pursuant to 5 U.S.C. Section 552 (b)(5). The Secretary further observes in his letter of July 12, 1978 that the third specification of our request "would require a search of the millions of documents contained in every investigatory file in the Commission", and concludes that "this would be an unreasonable burden".

We have received no list or index of the allegedly "exempt" documents mentioned in the Secretary's letter of July 12, 1978, and we are therefore unable to present a detailed argument as to whether such documents are in fact covered by the exemption set forth in 5 U.S.C. Sec-

tion 552(b)(5). We submit, however, that none of such documents are exempt from mandatory disclosure under that provision or any other provision of the Act, and we therefore request that the Commission make such documents promptly available to us. Further, we submit that the Commission will not be unreasonably burdened if it is required to conduct a reasonable search for the records described in the third specification of our request. We therefore submit that these records also should be made promptly available to us.

If the Commission determines that any or all of the documents in question are in fact exempt under the Act, we request that the Commission exercise its discretion to release such records. Pursuant to Section 4.11(2)(i)(c) of the Commission's Rules, we hereby advise the Commission that our client Grolier Incorporated is one of the respondents in an adjudicative proceeding now pending before the Commission (Docket No. 8879), and we seek access to the records in question because we believe such records may have some bearing on certain issues raised in that proceeding.

Very truly yours,

FURTH, FAHRNER & WONG

By /s/ Thomas R. Fahrner
THOMAS R. FAHRNER

TRF/emc

enclosures

EXHIBIT D

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

12 Oct. 1978

Office of the General Counsel

Thomas R. Fahrner, Esquire
Furth, Fahrner & Wong
Russ Building, Suite 1330
San Francisco, California 94104

Dear Mr. Fahrner:

This is in reply to your August 3, 1978, Freedom of Information Act appeal for documents in our files concerning the Commission's use of "covert" activities in any investigations of persons or companies.

Because of the broadness of your definition of "covert", which would include any preliminary investigatory work done without the foreknowledge of any individual or company investigated by the Commission's staff, a large number of investigations the Commission has considered or conducted could be construed to be responsive to your request. This would involve, as the Secretary's July 12, 1978, letter pointed out, a search of millions of Commission documents to ascertain which documents concerned previously unannounced investigatory activities. Your request, therefore, does not come within the definition of "identifiable records" as outlined by either § 552(a)(3) of the Freedom of Information Act or § 4.11(ii) of the Commission's Rules of Practice. An agency is not required under the Freedom of Information Act to conduct a search of every file in the agency in an effort to locate responsive material where those files are not brought together and worked upon as a group.[1]

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[1] *Cable Television Association, Inc.* v. *FCC*, 479 F.2d 183 (1978) at 192. See also, *Mason* v. *Callaway*, 554 F.2d 123 (4th Cir. 1977).

As Ms. Mary Fields of my staff explained to you in a phone conversation on August 16, 1978, our Office has agreed to make a reasonable search of its records to locate material responsive to your request. In an effort to accomplish this, each of the Assistant Directors in the Commission's many bureaus has been queried as to any investigations within his jurisdiction or knowledge involving covert activities (as defined in your letter). I understand that at the present time this effort is acceptable to you as a fulfillment of your request.

One Commission investigation has been identified which is responsive to Items 1 and 2 of your request. This was a civil penalty action brought against the Americana Corporation in 1972 by the Department of Justice.[2] All material collected by Mr. Wendell Reid of the Commission's staff in that instance were made available to Americana's counsel. There are several internal Commission memoranda concerning this case which are responsive to your request. However, they contain primarily deliberations and recommendations of staff, with factual information so intertwined as to preclude segregation. No other investigations have been identified responsive to those items.

My staff have been able to locate several Commission investigations wherein investigatory work was done without the foreknowledge of the individual or company that would come within your definition of "covert." In several of these cases much of the material collected and staff's underlying notes have already been placed on the public record. Some of the material in our files consist of legal documents filed by the parties involved and which refer to the investigatory activities in question. These documents are also publicly available.

After careful consideration, I have determined to grant your appeal with respect to certain documents or portions of documents. Other documents or portions of documents

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[2] Civil Action No. 388-2 DN.N.J. (1977); FTC Docket No. 5085.

are exempt from mandatory public disclosure pursuant to 5 U.S.C. § 552(b)(5) and are being withheld. These documents contain deliberations, opinions and recommendations of staff and are not required to be made public. The release of this material would discourage frank and open discussion, and thus hinder the Commission in its deliberations. For these reasons, therefore, release of exempt material is not required, and I have determined not to grant discretionary release. Factual information contained in the partially exempt documents is being released to you.

For access to the requested material that is being released or is on the public record, please contact Mr. Keith Golden, Freedom of Information and Privacy Act Branch, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580 (202) 528-3562.

In accordance with 5 U.S.C. § 552(a)(6)(C), you are advised that the undersigned is solely responsible for the denial of this appeal.

Sincerely,

/s/ Michael N. Sohn
MICHAEL N. SOHN
General Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER, INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the complaint insofar as any documents withheld from plaintiff are exempt from compelled disclosure pursuant to 5 U.S.C. § 552(b).

Third Defense

In answer to the numbered paragraphs of the complaint, defendants, by their undersigned attorneys, hereby admit, deny and aver as follows:

1. No response is required to allegations of jurisdiction.
2. Defendants have no knowledge as to the truth of this allegation.

3-6. Admitted.

7. Defendants admit that on or about June 20, 1978, the Federal Trade Commission received the request attached to the complaint as Exhibit A.

8. Defendants admit that the Commission responded to plaintiff's FOIA request by a letter from the Commission's Secretary, dated July 12, 1978 attached to the complaint as Exhibit B.

9. Defendants admit that on or about August 3, 1978 plaintiff filed an appeal to the Commission's General Counsel, a copy of which is attached to the complaint as Exhibit C.

10. Defendants admit that the Commission responded to plaintiff's appeal by a letter from the General Counsel dated October 12, 1978 and attached to the complaint as Exhibit D, and that as a result of the appeal certain documents were made available in their entirety. Portions of others were made available, and some were withheld in their entirety, pursuant to exemptions listed in 5 U.S.C. § 552(b).

11. Denied.

Prayer For Relief: Defendants deny that plaintiff is entitled to any relief whatsoever. All allegations not admitted or specifically denied are denied.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

LILLIAN A. MCEWEN
Assistant United States Attorney

Of Counsel:
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General Counsel
GERALD P. NORTON
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

MOTION OF DEFENDANTS FOR DISMISSAL OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendants hereby move to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the grounds that the complaint fails to state a claim upon which relief can be granted and that the Court lacks jurisdiction over the subject matter of the action; or, in the alternative for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

In support of this motion, defendants submit herewith an Index of Documents Withheld, a Statement of Material Facts as to Which there is No Genuine Issue, filed pursuant to Local Rule 1-9(h), and a memorandum with attachments.

Respectfully submitted,

CARL S. RAUH
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

/s/ Lillian A. McEwen

LILLIAN A. MCEWEN
Assistant United States Attorney

Of Counsel:

MICHAEL N. SOHN
General Counsel

W. DENNIS CROSS
Assistant General Counsel

CHARLES DAVID NELSON
Attorney

UNITED STATES DISTRICT COURT
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FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE, FILED PURSUANT TO LOCAL RULE 1-9(h)

Defendants submit that the following facts are undisputed:

1. Defendant, Federal Trade Commission ("Commission") is an agency of the United States. (Complaint, at 2.)

2. Defendants, Michael Pertschuk, Paul Rand Dixon, David M. Clanton, and Robert Pitofsky are members of the Federal Trade Commission. (Complaint, at 3.)

3. By letter dated August 3, 1978, Furth, Fahrner & Wong, attorneys for plaintiff, Grolier Incorporated ("Grolier") requested that the Commission make available certain documents, pursuant to the provisions of the Freedom of Information Act, 4 [sic] U.S.C. 552, as amended. (Grolier Exh. A.)

4. By letter dated July 12, 1978, the Secretary of the Commission denied the Request. (Grolier Exh. B.)

5. By letter dated August 3, 1978, Grolier appealed the denial of its request to the Commission. (Grolier Exh. C.)

6. By letter of October 12, 1978, the General Counsel, acting for the Commission, denied Grolier's appeal in part and granted it in part. (Grolier Exh. D.)

7. The instant law suit was filed on May 4, 1979, for access to certain documents or portions of documents which were not released by the Commission to defendant [sic], on appeal.

8. By letters of September 27 and 28 and October 5, 1979, the General Counsel amended the Commission's action of October 12, 1978, and made several hundred documents containing more than 7,000 additional pages available to the requestor. (Letters of Michael N. Sohn, Def. Exs. 1, 2 and 3.)

9. Plaintiff Grolier, is also plaintiff in a proceeding to review an order of the Commission, Grolier Incorporated v. Federal Trade Commission, now pending in the U.S. Court of Appeals for the Ninth Circuit (No. 78-2159). The action in the Ninth Circuit is not directly related to this action.

10. The Commission has withheld from its law enforcement files relating to the Americana Corporation, the Bestline Products Corporation and Montgomery Ward & Company, intra-agency memoranda of a pre-decisional nature, attorney work product, attorney-client communications, and memoranda of mental impressions.

11. Other documents withheld by the Commission are pre-decisional, intra-agency memoranda of a policy making nature. (Def. Exhs. G, I, J, K, and L.)

Respectfully submitted,

CARL S. RAUH
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

/s/ Lillian A. McEwen

LILLIAN A. MCEWEN
Assistant United States Attorney
United States Courthouse
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Washington, D.C. 20001
(202) 633-1886

Of Counsel:

MICHAEL N. SOHN
General Counsel

W. DENNIS CROSS
Assistant General Counsel

CHARLES DAVID NELSON
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER INCORPORATED, PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

AFFIDAVIT OF KENT C. HOWERTON

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

KENT C. HOWERTON, being first duly sworn, deposes and says:

1. I have been employed by the Federal Trade Commission ("Commission") as an attorney since September of 1969. From 1972 through 1976, I was assigned to serve "of counsel" to the Department of Justice which was bringing a civil penalty suit against the Americana Corporation ("Americana"), in Federal District Court, under the authority of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, at the request of the Commission. I had previously reviewed the investigation of Americana's compliance with a Commission order relating to sales practices which gave rise to the civil penalty action.

2. As a result of the facts described above, I am thoroughly familiar with the Commission's files relating to the investigation of Americana's practices and the lawsuit which resulted from that investigation.

3. I have read the Complaint, herein, and the portion of the Index to Documents which describes withheld documents relating to the Americana Corporation. The Index accurately describes the documents withheld.

4. Most of the documents in the Americana files relating to covert investigation were made public when put in the record in *United States* v. *Americana Corporation*, No. 388-72 (D.N.J.), in response to discovery requests by the defendants in that action. Additional documents and portions of documents were made available to the requestor in response to the FOIA request herein.

5. The few remaining documents withheld are attorney work product, attorney-client communications, and intra agency memoranda of a policy making nature. Document No. 1 contains advice which I gave to the Commission during the course of litigation regarding the available alternative strategies. When this document was prepared, the Commission was in the process of determining whether attorney's rough notes compiled in trial preparation would be given to the opposing party in compliance with a court order. All segregable factual portions of this memorandum have been disclosed; only opinions, evaluations and recommendations have been withheld. Document No. 2 is a draft of document No. 1. It was not sent or circulated. It reveals my thoughts as I developed the recommendations contained in the memorandum of advice which was eventually sent to the Commission. Document Nos. 3, 5, 6 and 7 record discussions and instructions relating to investigative methods and goals during the course of the litigation. These documents reveal my thought processes in the preparation of the Commission's case for litigation. Document No. 4 is a letter from the Commission, through its Secretary, to its attorney, the Department of Justice. This letter contains directions for the conduct of litigation on behalf of the Commission.

6. Disclosure of the documents described above deprive the Commission of the protections of the attorney-client and attorney work product privileges and would be a

deterrent to free and frank communication between the Commission and its attorneys and to full and careful trial preparation.

/s/ Kent C. Howerton
KENT C. HOWERTON

Subscribed and sworn to before me this 9th day of October, 1979.

/s/ [Illegible]
Notary Public

My Commission expires Aug. 14, 1981.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER INCORPORATED,
575 Lexington Avenue,
New York, New York 10022, PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL.,
6th and Pennsylvaia Avenue, N.W.,
Washington, D.C. 20580, DEFENDANTS

INDEX TO DOCUMENTS

Plaintiff sought access to three categories of records and documents of the FTC: 1) records and documents relating to a covert investigation of Americana Corporation and/or Grolier Incorporated, made in or about April 1973 by Federal Trade Commission Consumer Protection Specialist Wendell A. Reid; 2) records and documents referring or relating to any covert investigation by the Federal Trade Commission of twelve companies specifically named in the request; and, 3) records and documents referring or relating to any covert investigation made by any employee of the Federal Trade Commission of any person, company or other entity. The Federal Trade Commission's Secretary initially responded by stating that no records responsive to specifications (1) and (2) of the request had been identified. The Secretary stated that the third specification failed reasonably to identify the information sought and compliance with the request would place an unreasonable burden on the agency; further, the Secretary indicated that those records responsive to specification 3 which had been identified were exempt from mandatory disclosure.

In response to Plaintiff's appeal the General Counsel released fully or in part 124 documents comprising 414 pages. In addition, documents consisting of more than 7000 pages were made available to the requestor by the General Counsel on September 27, 1979 and September 28, 1979. (Def. Exhs. A and B, Letters of Michael Sohn). Those documents which continue to be withheld are exempt from disclosure pursuant to 5 U.S.C. § 552 (b)(5) and 7(C). Records withheld and applicable exemptions are identified in the following index.

Note: The numbers in parentheses at the left margin indicate the specific exceptions or subsections of 5 U.S.C. § 552(b) applicable to each document or group of documents. The factual bases for exempting these documents are fully described in the affidavits of Carol M. Thomas, Mary Fields, Kent C. Howerton, Randolph W. Tritell, William S. Sanger, Scott Klurfeld, Terry Latanich, Benita A. Sakin, Rachel Miller and John J. Phelan. (Def. Exhs. C through L, respectively).

CATEGORY A—RECORDS RELATING TO COVERT INVESTIGATION OF AMERICANA CORPORATION OR GROLIER INCORPORATED IN APRIL 1973

The following documents relate to the Commission's investigation of the Americana Corporation (Americana), then a subsidiary of Grolier, Inc., and to *United States* v. *Americana Corporation*, Civ. No. 388-72 (D.N.J.).

DOCUMENTS WITHHELD IN PART

Doc. # 1

(5) September 9, 1976. Fourteen pages, nine withheld.

A memorandum *to* the Commission *from* Kent C. Howerton, Attorney. This memorandum sets out and evaluates various litigation strategies available to the Commission in response to an order to turn

over to defense counsel certain of the trial preparation materials prepared by the Commission's attorneys and to answer certain interrogatories concerning communications between the Commission's counsel and witnesses, Commission employees, and the Commission itself. The portions not disclosed contain evaluations, opinions, and recommendations of the attorney. These portions are exempt from disclosure as privileged communications between attorney and client, as attorney work product, and as pre-decisional, intra-agency communications.

DOCUMENTS WITHHELD IN FULL

Doc. # 2

(5) Undated. Nineteen pages. This document is a draft of document # 1 described above. It is exempt from disclosure as a predecisional, intra-agency communication, as attorney-client communication, and as attorney work product.

Doc. # 3

(5) November 13, 1973. One page. Memorandum *from* Wendell A. Reid, Consumer Protection Specialist, New York Regional Office, *to* the Division of Compliance, Bureau of Consumer Protection. This document contains instructions of Attorney Howerton relating to procedures to be used in investigating the practices of the Americana Corporation for trial preparation. It is exempt from disclosure as attorney work product.

Doc. # 4

(5) October 15, 1976. Two pages. Letter *from* Charles A. Tobin, Secretary of the Commission, *to* Charles R. McConachie, Acting Chief, Consumer Affairs Section, Anti-trust Division, U.S. Department of Justice, setting forth the Commission's decision as to

the method of handling litigation in *U.S.* v. *Americana*. This document is exempt from disclosure as attorney-client communication.

Doc. # 5

(5) June 29, 1973. One page. Memorandum *to* compliance file *from* Kent Howerton, Attorney. This memorandum indicates the contents of discussions in which instructions regarding the investigation of Americana Corporation were given by Attorney Howerton. The memorandum indicates Mr. Howerton's thought processes in the preparation of the case and is exempt from disclosure as attorney work product.

Doc. # 6

(5) April 4, 1973. Two pages. A Memorandum *from* Kent C. Howerton *to* Alfred W. Cortese, Jr., Assistant Executive Director for Legal Coordination. This document contains an evaluation of the existing investigation of the Americana Corporation and recommendations related to obtaining additional evidence. It was prepared in contemplation of litigation and contains evaluations, recommendations, and opinions of counsel. It is exempt from disclosure as attorney work product.

Doc. # 7

(5) April 3, 1973. One page. Memorandum *to* the compliance file in the Americana case *from* Kent C. Howerton, Attorney. It records actions taken by attorney Howerton in relation to the investigation of Americana's practices which resulted in the filing of a civil penalty action. This memorandum reveals the thought processes of the attorney preparing the Commission's case and is exempt from disclosure as attorney work product.

* * * *

EXHIBIT A

Date: 9 Sep. 1976

MEMORANDUM

To: Commission

From: Kent C. Howerton, Attorney
Division of Compliance
Bureau of Consumer Protection

Subject: *U.S.* v. *Americana Corporation*
Civil No. 388-72, D.N.J.
F.T.C. Docket 5085

EXPEDITED CONSIDERATION NECESSARY AS SOON AS POSSIBLE.

INTRODUCTION

U.S. District Court Judge Clarkson Fisher has ordered the Government in this civil penalty proceeding to turn over to defendant certain trial preparation materials (including rough notes of interviews with consumer witnesses taken by Commission and Department of Justice attorneys in charge of the litigation and other intra-agency memoranda) and to answer certain Interrogatories we had refused to answer. This memorandum is submitted pursuant to Section 4.11(c) of the Commission's Rules of Practice. That provision requires any employee who is served with a subpoena or other compulsory process requiring the production of any document or record or the disclosure of any information which under Section 4.10 is exempt from availability for public inspection and copying to advise the Commission of the service of the compulsory process, the nature of the documents or information sought, and all relevant facts and circumstances.

BACKGROUND AND STATUS OF CASE

The Commission certified facts alleging violation of its order in Docket 5085 by Americana Corporation and thereafter the Department of Justice filed the civil penalty complaint on February 29, 1972. Staff of the Commission's Division of Compliance have appeared "Of Counsel" and have actively participated with staff of the Consumer Affairs Section of the Department of Justice in the case since December, 1973. The protracted proceedings in this matter are due largely to the extensive discovery conducted by the parties (including several sets of Interrogatories, Requests for Admissions, Requests for Production of Documents, depositions of consumer witnesses conducted by both parties, depositions of defendant's former or current officers conducted by plaintiff and depositions of the Commission's attorney-investigator Moira McDermott conducted by defendant), in addition to numerous discovery motions and oral arguments before the U.S. Magistrate handling discovery matters and before the U.S. District Court Judge assigned to the case.

The civil penalty complaint charges defendant Americana Corporation with:

(a) two counts of representing in advertisements that the *Encyclopedia Americana* contains more articles than any other set in violation of paragraph 2 of the Commission's order in Docket 5085; and

(b) twenty counts of misrepresenting in door-to-door sales to consumers that its publication is available only to selected individuals under special conditions, that individuals employed to sell its publications are anything other than salesmen soliciting prospects to purchase the publication at prices regularly established by defendant, and/or that a price in excess of the price at which the publication is customarily offered for sale and sold in the usual course of business is its customary or usual

price in violation of paragraphs 4, 5 and 6 of the Commission's order.

On February 26, 1974, Judge Fisher ruled on a previous Rule 37(a)(2), Fed. R. Civ. P., motion by defendant for an order compelling certain discovery of plaintiff. A copy of Judge Fisher's Memorandum and Order is attached hereto. Judge Fisher ordered plaintiff to turn over trial preparation materials of the Commission's attorney who conducted the original investigation (Moira McDermott), including her rough notes and memoranda regarding her interviews with customers of defendant. Although Judge Fisher held that Miss McDermott's notes of the interviews were squarely within the qualified protection of trial preparation materials of Rule 26(b)(3), Fed. R. Civ. P., he further held that defendant had met its burden under that Rule "to illustrate [its] substantial need for these documents and [its] inability, without undue hardship, to obtain them or their substantial equivalent by other means". Judge Fisher ordered plaintiff to turn over those materials. Pursuant to that Court order and the Commission's minutes of September 26, 1973, and January 30, 1974, directing that we could produce all investigatory or other files complied in this case since November, 1969, if so ordered by the Court, we turned over the materials to defendant.

Judge Fisher did not order plaintiff, as requested by defendant, to turn over trial preparation materials (rough notes and typed memoranda of interviews with consumer witnesses) of the Consumer Affairs Section and Compliance Division attorneys who were conducting the litigation for plaintiff (including those of interviews conducted prior to filing of the Complaint). He specifically denied defendant's motion that plaintiff turn over inter or intra-agency memoranda. We relied on that order as to the type of notes we took when we thereafter conducted further interviews with our consumer witnesses.

Following numerous further discovery arguments, the U.S. Magistrate, on November 12, 1975, and January 12,

1976, orally ordered plaintiff to turn over additional trial preparation documents prepared by Department of Justice and Compliance Division attorneys conducting the litigation, including notes of consumer witness interviews which he previously had not ordered plaintiff to produce, and to answer Interrogatories to which it had made objections.

Basically, the Magistrate's order requires the Government to:

(1) Produce the following documents:

(A) All rough notes or other memoranda prepared by plaintiff's litigating attorneys regarding any interviews or oral or written communications with consumer witnesses;

(B) All documents relating to plaintiff's litigating attorneys' communications with Commission attorney-investigator Moira McDermott since she ceased working for the Commission;

(C) All documents relating to Commission investigator Wendell Reid's communications with defendant or any subsidiary thereof, including plaintiff's litigating attorneys' communications with Reid and intra-agency memoranda relating thereto.

(2) Answer Interrogatories with specific page references to any documents regarding the following:

(A) Plaintiff's litigating attorneys' knowledge of all oral communications with consumer witnesses;

(B) Any knowledge of inconsistent statements made by consumer witnesses, including those contained in documents in the possession of defendant;

(C) All oral or written communications between plaintiff and Moira McDermott since she ceased working for the Commission;

(D) All admissions or declarations against interest on which the plaintiff will rely;

(E) All documents and written communications referring or relating to the investigation;

(F) All written reports or memoranda prepared during the investigation and prior to the filing of the Complaint;

(G) All oral communications referring or relating to the investigation prior to the filing of the Complaint;

(H) Who made the decision to institute the law suit;

(I) All oral communications or documents referring or relating to any recommendations made on the basis of the investigation;

(J) Each person interviewed or contacted during the investigation, including a complete description of the knowledge of each and all oral communications and documents in relation thereto.

Plaintiff filed its appeal to U.S. District Court Judge Fisher. Defendant made no showing that its counsel had ever even attempted to obtain the "substantial equivalent" [Rule 26(b)(3)] of the trial preparation documents (rough notes and memoranda regarding interviews with consumer witnesses) by interviewing the witnesses themselves or by other means. However, on April 7, 1976, Judge Fisher ordered plaintiff to turn over the documents and in every respect upheld the Magistrate's order.

The reference above to Commission investigator Wendell Reid must be further explained here. By memorandum of April 4, 1973, upon the request of the Consumer Affairs Section, we requested that the Commission's New York Regional Office conduct a supplemental investigation by having an attorney or CPS enroll in the sales personnel training course at one of defendant's sales offices without identifying himself or herself as an employee of the Commission to obtain evidence concerning

the sales training materials and instructions then being given to defendant's sales trainees. Mr. Wendell Reid of that office attempted to enroll in one such training course but instead was assigned to a sales office of a subsidiary of defendant. He met with representatives of that subsidiary on two or three occasions and received a few written sales pitches, and other materials. Following a public announcement by the Commission that it was not in favor of conducting investigations utilizing undercover tape recording of meetings, etc., I telephoned Mr. Reid on June 29, 1973, and instructed him to conduct no further investigation. He complied and later forwarded a memorandum dated November 13, 1973, to the Division of Compliance formally closing that supplemental investigation.

In a discovery response we filed on December 3, 1973, we identified the April 4 and November 13, 1973, intra-agency memoranda. Thereafter, we turned over copies of all documents Mr. Reid obtained from defendant's subsidiary but refused to produce the intra-agency memoranda. Defendant did not indicate that it was aware of the Reid supplemental investigation until during depositions we took of defendant's officers in the summer of 1975. Defendant made a further specific demand for these intra-agency memoranda and any other documents that exist relating to that supplemental investigation. Plaintiff claimed privilege but Judge Fisher has now ordered them produced. The only ones I am aware of are: (1) my memorandum of April 4, 1973, to the New York Regional Office; (2) my memoranda to the Compliance File of April 3 and June 29, 1973; (3) Mr. Reid's memorandum of November 13, 1973; and (4) Maurice S. Meyer's two memoranda of January 23, 1974, to J. Thomas Rosch (reporting on Mr. Reid's activities in response to the request for information from Senator Henry Jackson regarding monitoring conversations). A copy of each of those documents is attached hereto. Mr. Reid has been unable to find any other materials still in his possession.

Following the April 7 ruling, the Consumer Affairs Section staff forwarded to the Department's Appellate Section, Anti-Trust Division its recommendation against filing an appeal of the discovery order in the U.S. Circuit Court of Appeals. Thereafter, settlement negotiations were conducted and the Appellate Section's consideration was delayed pending the results of those negotiations. The negotiations proved fruitless. The Appellate Section has now returned to the Consumer Affairs Section the recommendations which its staff, its Deputy Chief and its Chief would make to the Solicitor General regarding an appeal.

• • • •

ANALYSIS OF CASE AT PRESENT AND ALTERNATIVES

Case at Present:

The civil penalty matter as originally certified contained two counts based on advertising and twenty counts based on door-to-door sales to consumers. During the course of discovery, plaintiff agreed to drop one of the consumer counts because of problems which surfaced during the taking of the consumer's deposition. Since the complaint was filed under provisions of the F.T.C. Act which then set a maximum civil penalty at $5,000 per violation, the remaining 21 counts could result in a maximum civil penalty of only $105,000.

Defendant now has in its possession rough notes of interviews with consumer witnesses made by the Commission's attorney-investigator, affidavits of those consumer witnesses obtained by the attorney-investigator, and extensive transcripts of depositions of both the consumer witnesses and the commission's attorney-investigator.

[seven blank pages followed]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER, INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

[Filed Feb. 21, 1980]

MEMORANDUM

This Freedom of Information Act ("FOIA") case comes before the court on cross-motions for summary judgment. The plaintiff seeks the disclosure of certain documents withheld by the Federal Trade Commission ("FTC"). The court will grant summary judgment on behalf of the FTC with respect to documents numbered 1, 2, and 4. *In camera* inspection will be ordered pursuant to documents numbered 3, 5, 6, and 7.

This case stems from an FTC investigation of Americana Corporation. The investigation took place in or about April, 1973. The plaintiff first requested access to all records or documents pertaining to the investigation on June 20, 1978.[1] The Commission denied the plaintiff's request by letter dated July 22, 1978. The Commission claimed that exemption five of the FOIA, 5 U.S.C. § 552(b)(5), precluded disclosure of the documents. The plaintiff appealed this denial on August 3, 1978. On October 12, 1978, the General Counsel granted

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[1] The plaintiff's original request also sought all records and documents pertaining to covert investigations directed at Grolier Corp. and its subsidiaries. It further sought all documents appurtenant to any covert investigation by the FTC. These requests, designated as categories B and C in the index of documents, have been withdrawn.

in part the plaintiff's appeal request.[2] Upon exhausting administrative remedies, Grolier filed the instant action on May 3, 1979.[3]

Discussion

This case presents the question whether seven documents withheld by the FTC properly fall within exemption five of the FOIA. 5 U.S.C. § 552(b)(5) states:

> (b) This section does not apply to matters that are—
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Exemption 5 "exempts those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This exemption encompasses two categories: 1) the privilege for confidential intra-agency advisory opinion; and 2) the attorney-client and work-product privileges. *Id.*

The intra-agency advisory opinion privilege prohibits disclosure of memoranda and documents that reflect "intra-office advice on policy" and the "administrative reasoning process." It also exempts documents relied upon in determining a course of action. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 945-46 (Ct.Cl. 1958). Disclosure of such documents would injure the consultative process within the government.[4] *Id.* at 946.

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[2] The General Counsel granted the release of 122 documents in full. He also authorized the release of factual portions of other documents. The FTC withheld 102 documents in whole or in part based on exemption five of the FOIA.

[3] The FTC released additional documents on September 27, 28 and October 5, 1979.

[4] Memoranda falling within the advisory opinion category must be distinguished betwen documents that incorporate the delibera-

The attorney-client privilege protects a client's confidential communications with an attorney concerning professional advice. *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The work-product privilege encompasses the work-product rule of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The rule applies to memoranda prepared in contemplation of litigation. This includes an attorney's mental impressions, conclusions, opinions, or legal theories pertaining to a particular litigation project. *Id.* at 511. Stated otherwise, exemption 5 subsumes the attorney work product privilege of Federal Rule of Civil Procedure 26(b)(3). *Mervin* v. *FTC*, 591 F.2d 821, 825 (D.C. Cir. 1978).

Herein, the FTC has provided a detailed *Vaughn* v. *Rosen* index with accompanying affidavits. The index identifies document number one as evaluating litigation strategies. It pertains to trial preparation materials and to certain interrogatory answers. Document number two is a draft of document number one.

There is litle question that these materials qualify as attorney work-product. This privilege, as explained above, protects from disclosure memoranda prepared in anticipation of litigation. Herein, the withheld portion of document number one [5] contains evaluations, opinions, and recommendations of the FTC pursuant to litigation preparation.

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tive, policy-making process, and memoranda containing factual material. *EPA* v. *Mink*, 410 U.S. 86, 89 (1973). Purely factual material contained in a deliberative memorandum is severable and discoverable. *Id.* at 87-88. But in some circumstances "the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by § 552(b)(5)." *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

[5] The FTC withheld document number two in full. This document constitutes an intra-agency communication. It is predecisional in that the document is a draft of a final memorandum that evaluates litigation strategies.

Document number four is a letter from the Secretary of the FTC to the Acting Chief, Consumer Affairs Section of the Anti-Trust Division of the Justice Department. The letter addresses the FTC's "decision as to the method of handling litigation in *U.S.* v. *Americana.*" This document qualifies as an attorney-client communication. It involves an agency's communications (FTC) with its attorneys at the Justice Department. *See Mead Data, supra,* at 252 (agency communication with attorneys constitutes attorney-client contact exempted under 5 U.S.C. § 552(b)(5)).

Documents 3, 5, 6, and 7 are memoranda discussing instructions and procedures relating to the investigation of Americana Corporation. The FTC claims that the work product privilege justifies nondisclosure of these materials. According to the FTC: document number 3 discusses trial preparation; documents number 5 and 7 encompass attorney thought processes; and document number 6 contains evaluations, opinions, and recommendations of counsel.

The court questions whether these documents qualify as work product. That evaluations, opinions, recommendations and thought processes can constitute work product is beyond dispute. But the key to the work product privilege is whether the FTC prepared such documents "with an eye toward litigation", *Hickman* v. *Taylor, supra,* at 394, or "in anticipation of litigation or for trial." Federal Rule of Civil Procedure 26(b)(3). As stated by Professor Wright:

> Prudent parties anticipate litigation and begin preparation prior to the formal commencement of an action. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

C. Wright, *Law of Federal Courts*, § 82 at 408-09 (1976).

It is unclear from the *Vaughn* index whether the FTC prepared the documents at issue with an eye toward the Americana litigation. The court therefore orders the FTC to produce these documents for *in camera* inspection. The Supreme Court in *EPA* v. *Mink*, *supra* at 93, expressly approved of this procedure. It noted that "if it [the agency] fails to meet its burden without *in camera* inspection, the District Court may order such inspection.

An appropriate Judgment accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

DATED: 2-21-79

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER, INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

[Filed Feb. 21, 1980]

JUDGMENT & ORDER

This matter came before the court on cross-motions for summary judgment. Upon review of the briefs submitted in this matter, the applicable law, and the record herein, it is, by the court, this 21st day of February, 1980,

ORDERED, ADJUDGED and DECREED that judgment be entered on behalf of the defendants with respect to documents number one, two and four; and it is further

ORDERED that the defendants submit documents number three, five, six and seven for *in camera* review before March 5.

/s/ Thomas A. Flannery
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 82-372

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

ORDER ALLOWING CERTIORARI

Filed November 8, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 594520 1208

Office - Supreme Court, U.S.
FILED
OCT 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

v.

GROLIER INCORPORATED,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent Grolier Incorporated

QUESTION PRESENTED

1. Does Exemption 5 of the Freedom Of Information Act, 5 U.S.C. § 552(b)(5), permit the Federal Trade Commission to withhold documents containing "work-product" of Federal Trade Commission attorneys, when the lawsuit for which the work-product documents were created was terminated with prejudice several years earlier, and no related litigation exists or potentially exists?

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No. 82-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

v.

GROLIER INCORPORATED,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Grolier Incorporated[1] opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 553 and appears as Appendix A to the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit ("Petition for Certiorari").[2] The

[1] All of Grolier Incorporated's subsidiaries or affiliates are wholly owned by Grolier Incorporated or by its wholly owned subsidiaries.

[2] In addition, by order of April 9, 1982, a Statement Of Circuit Judges Wright And Wald On Petition For Rehearing was added as an amendment to the panel order of April 7, 1982, denying appellees' petition for rehearing. That order appears in Appendix C to the Petition For Certiorari.

opinion of the District Court is unofficially reported at 1980-2 Trade Cas. (CCH) ¶63,389 (D.D.C. June 13, 1980).[3]

STATEMENT OF THE CASE

This lawsuit arose out of a Freedom Of Information Act ("FOIA") request by Grolier Incorporated ("Grolier") on June 20, 1978, seeking disclosure of documents and records including, *inter alia*, "documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973," by the Federal Trade Commission ("FTC").[4] The Commission initially denied Grolier's request in its entirety; however, following Grolier's administrative appeal of that denial, it released some documents while continuing to withhold others.

On May 3, 1979, Grolier filed this lawsuit seeking disclosure of documents withheld by the FTC. By letters of September 27 and 28 and October 5, 1979, the FTC released some additional documents. The FTC then moved to dismiss the complaint, alleging that the remaining undisclosed documents are exempt from disclosure.

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[3] An earlier district court opinion granting, *inter alia*, *in camera* review of documents "3", "5", "6" and "7", is unofficially reported at 1980-1 Trade Cas. (CCH) ¶63,188 (D.D.C. 1980) and appears as App. A, hereto.

[4] The investigation resulted in the filing of a civil penalty action by the government, entitled *United States* v. *Americana Corporation*, Civ. No. 388-72 (D.N.J.). Americana Corporation vigorously litigated that suit, and it was dismissed with prejudice on November 16, 1976, after the government refused to turn over documents pursuant to a discovery order. The documents involved in this appeal are among the documents which the court ordered be disclosed in the *Americana* litigation. Grolier contended in its brief to the Court of Appeals in this case that as a result of the discovery order in *Americana*, these documents were "available by law to a party other than an agency in litigation with the agency" and therefore were not exempt from disclosure pursuant to Exemption 5. The Court of Appeals did not, however, reach this issue, instead deciding this case on the grounds that in the context of the FOIA, the work-product privilege does not extend to documents created for litigation which has been terminated where no related litigation exists or potentially exists. In the event that certiorari is granted and the Court of Appeals decision is ultimately reversed, the case should be remanded to the Court of Appeals to consider the argument that Exemption 5 is inapplicable because the discovery order in the *Americana* litigation made the documents available by law to a party in litigation with the agency.

In its response to the FTC's motion, Grolier narrowed its request to seven documents. On February 21, 1980, the District Court granted the FTC's motion for summary judgment with respect to three of the documents. At that time, the court ordered *in camera* review of the other four documents, which are listed in the FTC's "Index to Documents" as documents "3," "5," "6," and "7"[5] to determine whether they contained attorney work-product that should be exempt from disclosure pursuant to Exemption 5 of the FOIA. *Grolier, Inc.* v. *FTC,* 1980-1 Trade Cas. (CCH) ¶63,188 (D.D.C. 1980). Following *in camera* review, the court granted the defendants' motion for summary judgment with respect to the latter four documents. *Grolier, Inc.* v. *FTC, 1980-2* Trade Cas. (CCH) ¶63,389 (D.D.C. 1980).

Grolier appealed from the grant of summary judgment with respect to six of the seven documents which the District Court held were exempt from disclosure. The Court of Appeals affirmed the District Court's judgment with respect to documents "1" and "4" on the grounds that those documents were exempt from disclosure under Exemption 5, since document 1 was a pre-decisional deliberative process memorandum and document 5 was a privileged attorney-client communication. However, it reversed the District Court judgment with respect to documents "3," "5," "6," and "7" and remanded the case to consider whether litigation related to the terminated action exists or potentially exists. If no such litigation exists or potentially exists, then the documents must be disclosed.

The Court of Appeals subsequently denied the FTC's petition for rehearing and its suggestion for rehearing *en banc.*[6]

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[5] The description of these documents contained in the FTC's Index to Documents is attached hereto as App. B.

[6] In response to the Petition For Rehearing And Suggestion For Rehearing En Banc Of The Appellees, Judges Wright and Wald filed an additional statement explaining that the majority opinion addressed the work-product privilege only. Appendix C to the Petition For Certiorari, pp. 17a-18a. The majority opinion did not address the deliberative process privilege, which is also encompassed under Exemption 5, because the government never raised that privilege with respect to documents "3," "5," "6" and "7" in any stage of the proceedings.

REASONS FOR DENYING THE WRIT

A. Disclosure Of The Documents Will Have No Detrimental Impact On The FTC In This Case.

The Petition for Certiorari in this case involves four documents generated for litigation which was terminated in 1976, and which cannot be revived. The documents discuss covert investigation techniques which have long been abandoned by the FTC. *Grolier Inc.* v. *FTC*, 671 F.2d 553, 557 (D.C. Cir. 1982). On the facts of this case, it is inconceivable that disclosure of these four documents would harm any legitimate governmental interest.

B. The Legal Standard Adopted By The Court Of Appeals Is Narrowly Confined And Will Affect Few Cases.

1. The Standard Is Limited To Exemption 5 Of The FOIA And Is Not Applicable To Civil Discovery Generally.

The legal standard adopted by the Court of Appeals for determining whether work-product documents are exempt from disclosure pursuant to the FOIA has no applicability to the work-product privilege generally. 671 F.2d at 556. As noted by the Court of Appeals, this follows for two reasons. First, unlike the civil discovery situation, with a Freedom of Information Act request "the presumption in favor of disclosure is at its zenith." *Id.* Second, in the context of civil discovery, courts may have been willing to extend the work-product privilege because of the qualified nature of the privilege and the ability of a litigant seeking discovery to overcome the privilege by demonstrating need. If the work-product doctrine were an unpenetrable protection against discovery, as it is under the FOIA, courts which extended the work-product privilege to include documents generated in terminated litigation, would not have done so. *Id.* at 556 n.6, *quoting United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

2. The Standard Is Applicable To A Narrowly Defined Factual Situation Which Will Arise Infrequently In FOIA Cases.

Petitioners argue that this decision will have a substantial detrimental impact for two reasons. First, they contend that every withholding of government records could be brought in the District of Columbia Circuit and that 38% of all FOIA suits brought in 1981 were filed in that Circuit. However, the total number or percentage of FOIA suits which are filed is irrelevant. The only critical question is the number of FOIA suits which have been filed seeking attorney work-product documents from terminated litigation where there is no existing or potential litigation. Since typically FOIA requests concern documents relating to on-going or potential litigation, the number of cases likely to be affected by the standard adopted by the Court of Appeals should be very small. In this respect, petitioner's assertion that FOIA requests might be filed for the purpose of determining whether sensitive investigations are underway is absurd. For the government to be harmed in this manner would require the unlikely combination of the following circumstances: (1) the party making the request already suspected that there was an investigation, but did not know whether it in fact existed; (2) work-product documents existing from previously terminated litigation; (3) a new investigation was underway which related to the terminated litigation; and (4) the investigation would be impeded by the public knowledge that it was being conducted.

Secondly, Petitioners contend that the rule adopted by the Court of Appeals would have a particularly "demoralizing" effect on government attorneys who are far more dependent on written files than their counterparts in civil practice because government cases last longer, government attorneys tend to be more transient, and because more coordination is necessary. Thus, Petitioners conclude that the quality and consistency of government litigation would suffer since much of what is now put down in writing would remain unwritten. However, the very pressures cited by Petitioners may compel government attorneys to continue writing down their thoughts and work despite potential disclosure. Moreover, Petitioners' argument

assumes that attorneys would be concerned about the disclosure of files from terminated litigation when there is no prospect for related litigation. Yet, as the Court of Appeals concluded:

> "When litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish. Indeed, 'where the work-product materials in question were prepared for a distinct and prior * * * litigation, long completed, the policies underlying the work-product privilege have already been achieved.' *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. 1977)." (*Grolier Inc. v. F.T.C.*, 671 F.2d at 556.)

Furthermore, many of the situations involving work product of government attorneys may still be exempt from disclosure pursuant to the deliberative process privilege which is incorporated in Exemption 5 of the FOIA. The Statement of Circuit Judges Wright and Wald on Petition for Rehearing explains that the majority opinion of the Court of Appeals did not address the applicability of the deliberative process privilege to the documents in this case, since the government never raised the issue. The deliberative process or executive privilege applies to predecisional documents reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated. *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The implication of Judge Wald's and Judge Wright's statement is that if the government documents fall within the deliberative process exemption, as well as the work-product exemption, they need not be disclosed.[7]

[7] This Court held, in *N.L.R.B.* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 159-60, that the work-product rule covers material prepared by attorneys related to agency decisions, even though the material was not exempt from disclosure under the deliberative process exemption because it was not predecisional. Likewise, although not exempt from disclosure under the work-product rule as incorporated in Exemption 5, because the litigation for which the document was created has terminated and no related litigation exists or potentially exists, a document might still be protected by the deliberative process exemption if it is a predecisional memorandum concerning an agency decision.

Thus, both because the test espoused by the Court of Appeals is restricted to FOIA requests rather than discovery generally, and because the conditions for applying the test will seldom arise and when they do arise any adverse impact on government attorneys will be negligible and far outweighed by the public policy favoring disclosure, this case does not present important questions of law warranting review by this Court.

C. There Is No Direct Conflict Between The Circuits Because Every Previous Case Considering Whether The Work-Product Privilege Lapses Once The Litigation For Which It Was Created Has Ended Arose In The Context Of Civil Discovery.

As discussed above, the Court of Appeals expressly limited the decision in this case to Exemption 5 of the FOIA, stating that "we deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act Request." *Id.* at 556. Accordingly, the Court of Appeals held that *"in the context of an FOIA request,* attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists." *Id.* (emphasis added).

This case is the only reported case in any federal circuit or district court to consider whether the work-product rule as incorporated in Exemption 5 of the FOIA lapses once the litigation for which it was created has ended. Every other case discussing this issue arose in the context of civil discovery and not Exemption 5 of the FOIA.[8] Thus, there is no *direct* conflict

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[8] *See e.g., In re Murphy,* 560 F.2d 326 (8th Cir. 1977); *United States* v. *Leggett & Platt, Inc.,* 542 F.2d 655 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); *Duplan Corp.* v. *Deering Milliken, Inc.,* 540 F.2d 1215 (4th Cir. 1976); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 509 F.2d 730 (4th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 487 F.2d 480 (4th Cir. 1973), (*reversing Duplan Corp.* v. *Deering Milliken, Inc.,* 61 F.R.D. 127 (D.S.C. 1973)); *Republic Gear Co.* v. *Borg-Warner Co.,* 381 F.2d 551 (2d Cir. 1967); *Hercules Inc.* v. *Exxon Corp.,* 434 F.Supp. 136 (D.Del. 1977); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.,* 275 F.Supp. 146 (E.D.Pa. 1967); *Hanover Shoe, Inc.* v. *United States Shoe Machinery Corp.,* 207 F.Supp. 407 (M.D.Pa. 1962); *In re Grand Jury Proceedings,* 73 F.R.D. 647 (M.D.Fla. 1977); *United States* v. *O.K. Tire Co.,* 71 F.R.D. 465 (D. Idaho 1976); *Virginia Electric Power Co.* v. *Sun Shipbuilding & Dry Dock Co.,* 68

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between this opinion and the reported opinions of any other Circuit Court of Appeals, or for that matter, with any other district court.

The fact that in the context of civil discovery other circuits have adopted a rule that the work-product privilege is perpetual, is not controlling in the context of the FOIA, since "the discovery rules can only be applied under Exemption 5 by way of rough analogies." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86 (1973).

Several cases have applied a different test in determining whether "work-product" documents may be withheld from disclosure pursuant to Exemption 5 of the FOIA from the test applied in determining whether "work-product" documents are discoverable. For example, in *Guckian* v. *General Services Administration*, No. 75-2156 *memorandum opinion*, 38 Ad.L.2d 1061 (D.D.C. April 20, 1976), the court held that the work-product privilege was narrower under Exemption 5 of the FOIA than it is in the context of civil discovery, because under the FOIA, factual material must be disclosed, whereas in civil discovery, factual material is privileged but the party seeking discovery can overcome the privilege by showing need. The court explained:

> "*Even assuming that the reports were developed in anticipation of litigation and are work-product under Rule 26(b)(3) as defendants claim, it does not follow that the reports must be protected from disclosure under the (b)(5) exemption.* Defendants are correct in their assertion that the (b)(5) exemption was intended to include the attorney work-product privilege. NLRB v. Sears, Roebuck & Co., ___ U.S. ___, 95 S.Ct. 1504, 1518 (1975). *Defendant's*

(Footnote continued from preceding page)

F.R.D. 397 (E.D.Va. 1975); *United States* v. *International Business Machines Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974); *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26 (D.Md. 1974); *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134 (S.D.N.Y. 1973); *Wood* v. *Breir*, 54 F.R.D. 7 (E.D. Wis. 1972); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Bourget* v. *Government Employee Insurance Co.*, 48 F.R.D. 29 (D.Conn. 1969); *La Rocca* v. *State Farm Mutual Automobile Insurance Co.*, 47 F.R.D. 278 (W.D. Pa. 1969); *Kirkland* v. *Morton Salt Co.*, 46 F.R.D. 28 (N.D. Ga. 1968); *Insurance Co. of North America* v. *Union Carbide Corp.*, 35 F.R.D. 520 (D. Colo. 1964); *Gulf Construction Co.* v. *St. Joe Paper Co.*, 24 F.R.D. 411 (S.D. Tex. 1959); *Tobacco & Allied Stocks, Inc.* v. *Transamerica Corp.*, 16 F.R.D. 534 (D.Del. 1954).

position, however, erroneously assumes that the (b)(5) exemption engulfs the entire work-product rule. Although the language of the (b)(5) exemption is broad enough to allow for an interpretation which would encompass all government documents, Congress and the courts have recognized that some limitation on the scope of the exemption is necessary in order to favor the goals of openness and disclosure which are at the heart of the FOIA.

"Congress chose to limit this exception by the application of the civil discovery rules, and the Supreme Court has made it clear that *the discovery principles are to be applied in exemption (b)(5) cases 'by way of rough analogies,' with the emphasis on furthering the purposes of the FOIA and the exemptions. Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86 (1973).[4] *Thus, the work-product rule, 26(b)(3) of the Federal Rules of Civil Procedure, works to bring documents within the scope of the (b)(5) exemption only when the application of that civil discovery rule would further the purposes underlying the act and exemption.*

"[4] It appears that some courts have interpreted the (b)(5) exemption to require a literal application of the civil discovery rules. E.G., *Brockway* v. *Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975). This interpretation of exemption (b)(5) is unsatisfactory in light of the different purposes underlying the rules of discovery and the (b)(5) exemption. It is, however, unclear to this Court whether the court in Brockway was interpreting the (b)(5) exemption to require a literal application of the discovery rules in all cases, or whether it had determined that the purpose of the FOIA would be furthered by such a literal application in that particular case."

(38 Ad.L.2d at 1068.)

In *Fonda* v. *Central Intelligence Agency*, 434 F.Supp. 498 (D.D.C. 1977), the court followed similar reasoning in holding that documents claimed to be exempt from disclosure under Exemption 5 because they were attorney work-product should be examined *in camera* to determine whether the material was factual, since in the context of the FOIA, the work-product privilege does not apply to such factual material. The court stated:

"The Supreme Court has observed that, 'at best, the discovery rules can only be applied under exemption 5 by way of rough analogies,' since the FOIA context is not

completely analogous to civil litigation involving private litigants. *EPA* v. *Mink*, 410 U.S. 73, 86, 93 S.Ct. 827, 835, 35 L.Ed.2d 119 (1973). This observation is evidenced when one attempts to apply the attorney work product privilege outlined in Rule 26(b)(3) of the Federal Rules of Civil procedure in an FOIA context, a task that would challenge the fabled Procrustes. Rule 26(b)(3) speaks to the situation when one party seeks to discover materials prepared by the other party's attorney for the litigation in which they are engaged. It permits a certain amount of discovery of factual and tangible material upon a showing of special need in the litigation at issue. It never permits discovery of mental impressions, conclusions, opinions, or legal theories of an attorney. Since these rules cannot be dovetailed into the FOIA context, they must be applied in light of the policy underlying exemption 5.

"Fortunately, another Judge of this Court has already had occasion to examine the limits of the attorney work product privilege in the light of exemption 5. In *Guckian* v. *GSA*, Civil No. 75-2156, at 10-11, 38 Ad.L.2d 1061, 1068 (D.D.C. 1976), Judge Richey has held that the portion of the attorney work product rule subsumed into exemption 5 is that portion which protects from discovery mental impressions, conclusions, or legal theories of a Government attorney, the deliberations of counsel but not factual and tangible matter." (*Id.* at 505.)

The same reasoning process which was used in *Guckian* and *Fonda* is equally applicable to this case. As in those cases, the government asserts that the documents are exempt from disclosure pursuant to Exemption 5 of the FOIA, because they would be subject to a qualified privilege in the context of civil discovery. Furthermore, the government asserts that since no showing of need is permissible under the FOIA to overcome the privilege, the documents are not "routinely available" and are therefore exempt from disclosure pursuant to the FOIA. Yet, it is precisely because no showing of need is permissible under the FOIA to overcome the privilege, that the privilege must be more narrowly construed under Exemption 5 than it is in the context of civil discovery. Just as *Guckian* and *Fonda* held that

factual work-product material, which is normally subject to a qualified privilege in the context of civil discovery, must be disclosed despite Exemption 5 of the FOIA, here, work-product from terminated litigation, which other circuits have held is subject to a qualified privilege in the context of civil discovery, must also be disclosed where no related litigation exists or potentially exists.

Given that this decision is limited to the FOIA, whereas previous decisions of other circuits were in the context of civil discovery rules, and, given that the work-product rule under Exemption 5 is not identical to the work-product rule in the context of civil discovery, there is no conflict between the circuits warranting review by this Court.

D. There Is No Conflict Between The Decision Of The Court Of Appeals And Any Prior Decision Of This Court.

Petitioners assert that because the Court of Appeals distinguished the work-product rule in civil discovery from the rule under Exemption 5, "the court's decision squarely contravenes both the plain language and legislative history of Exemption 5 and its construction by this Court." Citing *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Federal Open Market Committee, Etc.* v. *Merrill*, 443 U.S. 340, 353 (1979). However, neither of those cases nor any other decision of this Court suggests that the standard for determining whether work-product documents should be disclosed must be identical under Exemption 5 to the standard used in civil discovery. Indeed, as discussed above, this Court held in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86 (1973), that "the discovery rules can only be applied under Exemption 5 by way of rough analogies."

In *NLRB* v. *Sears, Roebuck & Co.*, this Court stated that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." 421 U.S. at 149. "Since the ability of a private litigant to overcome a privilege claim" in the civil discovery context may itself turn on his need, "it is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is *the most compelling.*" Emphasis added.

Rather, "Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation." *Id.* at n.16.

This language does not necessarily lead to petitioners' conclusion that unless the documents would be available to any party in litigation with an agency regardless of need they may be withheld from disclosure pursuant to Exemption 5 of the FOIA. Rather, it merely states that one must not view a party requesting documents pursuant to the FOIA as in the same position as a private litigant with the *most compelling* need for discovery, since to do so would eviscerate the Exemption by making virtually every privileged document subject to disclosure.

When this Court in *Sears* specifically discussed the work-product rule as applicable to Exemption 5, the Court's statement of the rule was confined to those work-product documents which lie at the core of the rule which would not be subject to discovery even where need for the documents was demonstrated. The Court stated:

> "It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law .... Whatever, the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." (*Id.* at 154.)

Thus, the petitioner's assertion that every work-product document which might be privileged in civil discovery is necessarily exempt from disclosure pursuant to the FOIA, simply is not supported by *Sears*.

Similarly, *Federal Open Market Committee, etc.* v. *Merrill, supra,* does not support the contention that the work-product privilege under Exemption 5 is identical to the privilege in civil discovery.[9] The portion of that opinion cited by petitioners

[9] *FOMC* v. *Merrill* involved the deliberative process privilege and the privilege for confidential commercial information and not the work-product rule.

merely reiterates the language quoted above from *Sears*. More telling is discussion in that opinion of the privilege for confidential commercial information under Exemption 5. This Court stated that "federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information" (443 U.S. at 356) and concluded that the privilege is incorporated by Exemption 5 of the FOIA. *Id.* at 360. However, the Court explained that in the civil discovery context "the courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim for privacy against the need for disclosure." *Id.* at 362. Despite the above-quoted language from *Sears* and the fact that one does not consider the requestor's special need for disclosure under the FOIA, this Court held in *Merrill* that the qualified nature of the privilege required that it not be applied in every case where a trade secret claim might be upheld in civil discovery. Rather, only where the government would be significantly harmed by disclosure could it delay disclosure pursuant to Exemption 5. This Court explained:

> " 'The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.' . . . We are mindful that 'the discovery rules can only be applied under Exemption 5 by way of rough analogies,' . . . and, in particular, that the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. . . . Nevertheless, the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege. Accordingly, we think that if the Domestic Policy Directives contain sensitive information not otherwise available, and if immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests, then a slight delay in the publication of the

> Directives, such as that authorized by 12 CFR § 271.5, would be permitted under Exemption 5." (*Id.* at 362-63; citations and footnotes omitted.)

Thus, none of this Court's previous opinions requires a literal incorporation of the rules of civil discovery in determining whether a document is exempt from disclosure pursuant to Exemption 5 of the FOIA. Moreover, while the need of the requestor may not be considered in determining whether documents must be disclosed, the harm to the government agency may be considered, and where that harm is minimal, documents subject to only a qualified privilege in civil discovery should be disclosed pursuant to an FOIA request. Here, the application of the standard adopted by the Court of Appeals would result in only minimal harm to the government, if it would result in any harm at all.

E. The Standard Adopted By The Court Of Appeals Most Appropriately Balances The Competing Policies Of The FOIA And The Work-Product Rule.

This Court recognized in *FOMC* v. *Merrill, supra,* that "the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege." 443 U.S. at 363. Here, the Court of Appeals determined that "[w]hen litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish [because] the policies underlying the work-product privilege have already been achieved."

While no other cases have explicitly considered whether the work-product privilege under Exemption 5 of the FOIA extends to documents generated in litigation which has terminated, other decisions have indicated that the fact that the dispute for which the documents were generated has ended would be relevant in concluding that the documents should not be exempt from disclosure.

For example, in *Martin Marietta Aluminum, Inc.* v. *Administrator, General Services Administration,* 444 F.Supp. 945 (C.D.Cal. 1977), the court considered whether private appraisers' reports which were furnished to the General Services Administration were subject to disclosure pursuant to an FOIA request. After explaining that there was a privilege from discovery for such reports, the court distinguished two cases in which such appraisals were ordered disclosed, on the grounds that in those cases the disclosure came after the sale was consummated and therefore could not harm the government.[10]

The court in *Martin Marietta Aluminum* held that under the FOIA it was required to consider the harm which would result from disclosure of the requested documents. Since in that case the harm would be significant, the documents were exempt from disclosure pursuant to Exemption 5. The court explained:

> "Courts appropriately exercise equity powers in deciding disputed exemption claims in FOIA cases. Guidelines for exercising those powers were succinctly set out by the Ninth Circuit:
>
> > In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to

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[10] Plaintiff relied on *Tennessean Newspapers, Inc.* v. *Federal Housing Administration,* 464 F.2d 657, 660 (6th Cir. 1972), *aff'g* 341 F.Supp. 1013, 1015 (M.D.Tenn. 1971), and *Philadelphia Newspapers, Inc.* v. *Department of Housing and Urban Development,* 343 F.Supp. 1176, 1178 (E.D.Pa. 1972). The court rejected their argument stating that:

> "These cases, however, considered the release of an appraiser's report *after* a sale was consummated, a time when disclosure would not disrupt the governmental agency's decision-making process nor unduly hamper sales of government property. Thus, they are inapposite." (444 F.Supp. at 945.)

Similarly, in *Hoover* v. *United States Department of the Interior,* 611 F.2d 1132 (5th Cir. 1980) the court distinguished *Philadelphia Newspapers,* and *General Services Administration* v. *Benson,* 415 F.2d 878 (9th Cir. 1969) on similar grounds. The court in *Hoover* stated:

> "Most importantly, both cases involved disclosure requests for appraisals which were no longer being actively used by the government. As such, the asserted interest in protecting the government's bargaining position is, of course, nonexistent." (611 F.2d at 1140, n.10.)

traditional equity principles, and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration.

"*General Services Administration* v. *Benson*, 415 F.2d 878, 880 (9th Cir. 1969). The court believes that the Government would be severely handicapped in attempting to sell property if potential buyers were routinely given pre-sale access to appraisers' reports prepared by or for governmental agencies.

"In this case, weighing the harm that would be suffered by plaintiff if disclosure is denied against the harm that would be suffered by the public if disclosure is granted, the court is satisfied that the equities favor the Government's decision not to disclose the information in question. Accordingly, the court holds that the withheld portions of the appraisers' reports fall within the exemption set out in 5 U.S.C. § 552(b)(5) and need not be disclosed to plaintiff before the sale of the equipment is consummated." (494 F.Supp. at 950.)

In *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854 (D.C.Cir. 1980), the court explained that the purpose for the work-product rule is to protect the adversary process:

"The purpose of the [work product] privilege, however, is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself. . . . [T]he scope of the protection is limited, as Judge Wilkey made clear in *Jordan* [*Jordan* v. *U.S. Dep't of Justice*, 591 F.2d 753 (1978)]:

'The work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest . . . [T]he privilege focuses on the integrity of the trial process itself . . . [which] is reflected in the specific limitation of the privilege to materials "*prepared in anticipation of litigation or for trial.*" ' " (617 F.2d at 864.)

Other courts have noted that "because the privilege obstructs the search for truth and because its benefits are, at best, 'indirect and speculative,' it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.' " *In Re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979).

The documents which are subject to petitioner's appeal refer to an action brought by the federal government against a Grolier subsidiary several years ago, styled *U.S.* v. *Americana Corp.*, Civ. No. 388-72 (D.N.J.). That action was dismissed with prejudice on November 17, 1976, after the FTC disobeyed a court order to turn over certain materials to the defendants. Thus, the litigation for which these documents were created was terminated long before Grolier made its FOIA request, and there are no prospects that it will be reinstituted. In this situation, the policy reasons for exempting the attorney's work product from disclosure are much weaker than in the situation in which an attorney seeks to discover his adversary's thoughts about pending litigation. Here, the attorney need no longer fear that his opponent will get an unfair advantage by discovering his strategies prior to trial.

Not only are the policy reasons weaker for withholding documents from disclosure once the litigation has terminated, but the policy behind the FOIA also requires that the work-product rule be construed as narrowly as possible. The purpose of the FOIA is to encourage broad public disclosure of government documents. *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 79; S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965); H.R.Rep. No. 1497, 89th Cong., 2d Sess., 12 (1966). Given the broad policies of disclosure under the FOIA and the fact that the reasons for applying the work-product rule are substantially diminished under the test adopted by the Court of Appeals, the standard adopted by the Court of Appeals appropriately balances the competing policies of the work-product rule and the FOIA.

Grolier acknowledges that there is a split of authority among the circuits in the context of civil discovery on the

appropriate test for determining whether work-product documents generated for unrelated litigation which has been terminated must be disclosed.[11] However, that split does not warrant this Court's review of the Court of Appeals' opinion, which is confined to the context of the FOIA.

---

[11] Petitioner contends that there is no split in authority in the civil discovery context because no case actually held that material from a previous unrelated case was discoverable. This is simply untrue. As Moore's *Federal Practice* points out, the language used in many of the lower court opinions indicates that "the question as to whether the papers in one action were to be considered 'work-product' for purposes of a subsequent one, turned on whether the first action was complete and upon the relationship between the first and second actions." 4 J. Moore *Federal Practice* ¶26.64[2] p. 26-415 (2d ed. 1982). *See, e.g., United States* v. *International Business Machines Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974) (holding that work-product material is only privileged from disclosure in the specific litigation for which it was created, the court stating, "[a]lthough there is a split in authority on this point . . . this court is of the view that for something to be considered 'trial preparation material' 'work product' under Fed.R.Civ.P. 26(b)(3) it must be prepared 'in anticipation of litigation or for trial' in the case in which the special immunity accorded to such material is sought."); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D.Pa. 1970) ("An attorneys' memorandum in a prior case involving different parties does not have the protection of the 'work product' principle.").

CONCLUSION

For all of the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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APPENDIX A

[¶63,188] Grolier, Inc. v. Federal Trade Commission, et al.

U.S. District Court, District of Columbia. Civil Action No. 79-1215. Filed February 21, 1980.

Memorandum

FLANNERY, D.J.: This Freedom of Information Act ("FOIA") case comes before the court on cross-motions for summary judgment. The plaintiff seeks the disclosure of certain documents withheld by the Federal Trade Commission ("FTC"). The court will grant summary judgment on behalf of the FTC with respect to documents numbered 1, 2, and 4. *In camera* inspection will be ordered pursuant to documents numbered 3, 5, 6, and 7.

This case stems from an FTC investigation of Americana Corporation. The investigation took place in or about April, 1973. The plaintiff first requested access to all records or documents pertaining to the investigation on June 20, 1978.[1] The Commission denied the plaintiff's request by letter dated July 22, 1978. The Commission claimed that exemption five of the FOIA, 5 U.S.C. § 552(b)(5), precluded disclosure of the documents. The plaintiff appealed this denial on August 3, 1978. On October 12, 1978, the General Counsel granted in part the plaintiff's appeal request.[2] Upon exhausting administrative remedies, Grolier filed the instant action on May 3, 1979.[3]

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[1] The plaintiff's original request also sought all records and documents pertaining to covert investigations directed at Grolier Corp. and its subsidiaries. It further sought all documents appurtenant to any covert investigation by the FTC. These requests, designated as categories B and C in the index of documents, have been withdrawn.

[2] The General Counsel granted the release of 122 documents in full. He also authorized the release of factual portions of other documents. The FTC withheld 102 documents in whole or in part based on exemption five of the FOIA.

[3] The FTC released additional documents on September 27, 28 and October 5, 1979.

Discussion

This case presents the question whether seven documents withheld by the FTC fall within exemption five of the FOIA. 5 U.S.C. § 552(b)(5) states:

> (b) This section does not apply to matters that are—(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Exemption 5 "exempts those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This exemption encompasses two categories: (1) the privilege for confidential intra-agency advisory opinions; and (2) the attorney-client and work-product privileges. *Id.*

The intra-agency advisory opinion privilege prohibits disclosure of memoranda and documents that reflect "intra-office advice on policy" and the "administrative reasoning process." It also exempts documents relied upon in determining a course of action. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F.Supp. 939, 945-46 (Ct. Cl. 1958). Disclosure of such documents would injure the consulative process within the government.[4] *Id.* at 946.

The attorney-client privilege protects a client's confidential communications with an attorney concerning professional advice. *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 252 (D.C.Cir. 1977). The work-product privilege encompasses the work-product rule of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The rule applies to memoranda prepared in contemplation of litigation. This includes an attorney's mental impressions, conclusions, opinions, or legal theories pertaining

[4] Memoranda falling within the advisory opinion category must be distinguished between documents that incorporate the deliberative, policy-making process, and memoranda containing factual material. *EPA* v. *Mink*, 410 U.S. 86, 89 (1973). Purely factual material contained in a deliberative memorandum is severable and discoverable. *Id.* at 87-88. But in some circumstances "the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by § 552(b)(5)." *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

to a particular litigation project. *Id.* at 511. Stated otherwise, exemption 5 subsumes the attorney work product privilege of Federal Rule of Civil Procedure 26(b)(3). *Mervin* v. *FTC*, 591 F.2d 821, 825 (D.C. Cir. 1978).

[*Index*]

Herein, the FTC has provided a detailed *Vaughn* v. *Rosen* index with accompanying affidavits. The index identifies document number one as evaluating litigation strategies. It pertains to trial preparation materials and to certain interrogatory answers. Document number two is a draft of document number one.

There is little question that these materials qualify as attorney work-product. This privilege, as explained above, protects from disclosure memoranda prepared in anticipation of litigation. Herein, the withheld portion of document number one[5] contains evaluations, opinions, and recommendations of the FTC pursuant to litigation preparation.

Document number four is a letter from the Secretary of the FTC to the Acting Chief, Consumer Affairs Section of the Anti-Trust Division of the Justice Department. The letter addresses the FTC's "decision as to the method of handling litigation in *U.S.* v. *Americana.*" This document qualifies as an attorney-client communication. It involves an agency's communications (FTC) with its attorneys at the Justice Department. See *Mead Data, supra,* at 252 (agency communication with attorneys constitutes attorney-client contact exempted under 5 U.S.C. § 552(b)(5)).

Documents 3, 5, 6, and 7 are memoranda discussing instructions and procedures relating to the investigation of Americana Corporation. The FTC claims that the work product privilege justifies nondisclosure of these materials. According to the FTC: document number 3 discusses trial preparation; documents number 5 and 7 encompass attorney thought processes; and document number 6 contains evaluations, opinions, and recommendations of counsel.

---

[5] The FTC withheld document number two in full. This document constitutes an intra-agency communication. It is predecisional in that the document is a draft of a final memorandum that evaluates litigation strategies.

The court questions whether these documents qualify as work product. That evaluations, opinions, recommendations and thought processes can constitute work product is beyond dispute. But the key to the work product privilege is whether the FTC prepared such documents "with an eye toward litigation", *Hickman* v. *Taylor, supra,* at 394, or "in anticipation of litigation or for trial." Federal Rule of Civil Procedure 26(b)(3). As stated by Professor Wright:

> Prudent parties anticipate litigation and begin preparation prior to the formal commencement of an action. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

C. Wright, *Law of Federal Courts,* § 82 at 408-09 (1976).

It is unclear from the *Vaughn* index whether the FTC prepared the documents at issue with an eye toward the Americana litigation. The court therefore orders the FTC to produce these documents for *in camera* inspection. The Supreme Court in *EPA* v. *Mink, supra* at 93, expressly approved of this procedure. It noted that "if it [the agency] fails to meet its burden without *in camera* inspection, the District Court may order such inspection.

An appropriate Judgment accompanies this Memorandum.

APPENDIX B

"Doc. #3

"(5) November 13, 1973. One page. Memorandum *from* Wendell A. Reid, Consumer Protection Specialist, New York Regional Office, *to* the Division of Compliance, Bureau of Consumer Protection. This document contains instructions of Attorney Howerton relating to procedures to be used in investigating the practices of the Americana Corporation for trial preparation. It is exempt from disclosure as attorney work product.

"Doc. #5

"(5) June 29, 1973. One page. Memorandum *to* compliance file *from* Kent Howerton, Attorney. This memorandum indicates the contents of discussions in which instructions regarding the investigation of Americana Corporation were given by Attorney Howerton. The memorandum indicates Mr. Howerton's thought processes in the preparation of the case and is exempt from disclosure as attorney work product.

"Doc.

"(5) April 4, 1973. Two pages. A Memorandum *from* Kent C. Howerton *to* Alfred W. Cortese, Jr., Assistant Executive Director for Legal Coordination. This document contains an evaluation of the existing investigation of the Americana Corporation and recommendations related to obtaining additional evidence. It was prepared in contemplation of litigation and contains evaluations, recommendations, and opinions of counsel. It is exempt from disclosure as attorney work product.

"Doc. #7

"(5) April 3, 1973. One page. Memorandum *to* the compliance file in the Americana case *from* Kent C. Howerton, Attorney. It records actions taken by attorney Howerton in relation to the investigation of Americana's practices which resulted in the filing of a civil penalty action. This memorandum reveals the thought processes of the attorney preparing the Commission's case and is exempt from disclosure as attorney work product." (J.A. 61-63.)

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No. 82-372

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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---

1. Respondent "acknowledges that there is a split of authority among the circuits in the context of civil discovery on the appropriate test for determining whether work-product documents generated for unrelated litigation which has been terminated must be disclosed" (Br. in Opp. 17-18). However, because this is a Freedom of Information Act (FOIA) case, respondent contends (Br. in Opp. 7-11) that there is no "*direct* conflict" (Br. in Opp. 7; emphasis in original) between the decision in this case and the decisions of three other circuits holding that attorney work product from terminated litigation is privileged in the civil discovery context. Respondent's argument is inconsistent with *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), in which this Court concluded that Exemption 5 of the FOIA protects "those documents * * * normally privileged in the civil discovery context." Since three circuits have held that documents such as those at issue here are *always* privileged

in civil discovery (although the privilege may sometimes be overcome by a showing of need), those circuits would be compelled, under the approach required by *Sears*, to reach a result opposite to that of the court below.

2. Respondent unsuccessfully attempts (Br. in Opp. 11-14) to harmonize the court of appeals' decision in this case with *Sears* and *FOMC* v. *Merrill*, 443 U.S. 340 (1979). In both those cases, this Court pointed out that Exemption 5 was intended to permit an agency to withhold documents that would not "routinely" be disclosed to a private party in civil discovery (443 U.S. at 353; 421 U.S. at 149). Contrary to respondent's suggestion (see Br. in Opp. 12; emphasis in original), this Court clearly said more than "merely * * * that one must not view a party requesting documents pursuant to the FOIA as in the same position as a private litigant with the *most compelling* need for discovery." A "routine" case is not the same as the "most compelling" case.

Similarly, nothing in *Sears* supports respondent's suggestion (Br. in Opp. 12) that Exemption 5 protects only "those work-product documents which lie at the core of the rule." The portion of the Court's opinion upon which respondent relies simply discusses the scope of the attorney's work-product rule and does not even hint that its scope differs in the civil discovery and FOIA contexts.

Respondent misconstrues *Merrill* in a similar manner (see Br. in Opp. 12-14). Contrary to respondent's suggestion, this Court did not remand in *Merrill* for a determination whether documents that would be privileged in civil discovery should nevertheless be ordered to be disclosed under the FOIA. Instead, the Court remanded for a determination whether the relevant portions of the documents would be privileged in private litigation (see 443 U.S. at 346). The plain implication of the Court's opinion is that if

the district court were to conclude that the documents would normally be privileged in civil litigation—because of the harm caused by their release—then withholding under Exemption 5 would be authorized as well (see *id.* at 363-364).

3. Respondent contends (Br. in Opp. 4-7) that the decision below will affect only a "few cases" (Br. in Opp. 5) "[s]ince typically FOIA requests concern documents relating to on-going or potential litigation." Respondent's assertion is unsubstantiated, and, in any event, as we argued in our petition (Pet. 10), the concept of "potential * * * litigation" is meaningless for all practical purposes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JOHN H. CARLEY
General Counsel
Federal Trade Commission

OCTOBER 1982

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QUESTION PRESENTED

Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), continues to exempt from mandatory disclosure the work product of government attorneys after the litigation for which the material was prepared has ended and related litigation does not exist or potentially exist.

PARTIES TO THE PROCEEDING

The parties in the court of appeals, in addition to those named in the caption, were the members of the Federal Trade Commission. At present, the members of the Commission are James C. Miller, III, Chairman, and Michael Pertschuk, David M. Clanton, Patricia P. Bailey, and George W. Douglas, Commissioners.

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v.

GROLIER INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 671 F.2d 553. The opinion of the district court (Pet. App. 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1982 (Pet. App. 15a), and a timely petition for rehearing was denied on April 7, 1982 (*id.* at 16a, 19a). By orders of June 29, 1982, and August 3, 1982, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including September 4, 1982. The petition was filed on September 2, 1982, and was granted on No-

vember 8, 1982 (J.A. 52). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Subsection (a)(3) of the Freedom of Information Act, 5 U.S.C. 552(a)(3), provides:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Subsection (b)(5) of the Freedom of Information Act, 5 U.S.C. 552(b)(5) provides:

> (b) This section does not apply to matters that are—
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> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

This Freedom of Information Act ("FOIA") suit arose out of a request by respondent Grolier Incorporated for documents of the Federal Trade Commission ("FTC") concerning, among other things, a covert investigation by the FTC of one of Grolier's subsidiaries, the Americana Corporation (Pet. App. 1a).[1]

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[1] In addition to records relating to the Americana investigation ("Category A" records), Grolier also requested records relating to covert investigations of any of its 14 subsidi-

This investigation had been undertaken in connection with a civil penalty action filed by the Department of Justice in 1972 (*United States* v. *Americana Corp.*, Civil No. 388-72 (D.N.J.)) (Pet. App. 1a).[2] The FTC complied in part with the FOIA request, but it withheld part or all of seven documents relating to the investigation of Americana. Grolier then brought suit in the United States District Court for the District of Columbia to compel release of those documents.

The FTC contended that certain of the documents,[3] including the four still at issue (*i.e.*, Numbers 3, 5,

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aries ("Category B" records) and records relating to covert investigations of any person, company, or entity ("Category C" records). However, Grolier's district court complaint was confined to Category A and B records, and Grolier later withdrew any claim for further disclosure of Category B documents. Thus, Grolier's appeal involved only Category A records. See Appellant's Opening Brief at 2 n.1.

[2] The civil penalty action was based upon an alleged violation of a 1949 cease and desist order prohibiting false advertising and misrepresentations in door-to-door sales. The suit was dismissed with prejudice on Nov. 17, 1976, after the Commission declined to comply with a district court order directing it to turn over certain documents to the defendant (Pet. App. 1a-2a).

[3] The FTC withheld two other documents—Numbers 1 and 2—on the grounds that they were work product and predecisional. Court of Appeals Joint Appendix ("C.A. App.") 60-61. The district court upheld the withholding of these documents under the work-product rationale (J.A. 48, 51). Grolier subsequently withdrew its claim for disclosure of document 2 (Pet. App. 2a n.3), and the court of appeals affirmed the district court's judgment regarding document 1 under the pre-decisional rationale (*id.* at 8a).

The Commission also withheld document 4 as an attorney-client communication (J.A. 36-37). Both the district court and the court of appeals upheld the withholding of this document on that basis (J.A. 49, 51; Pet. App. 2a n.3).

6, and 7), fell within Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because they were work product compiled by FTC attorneys in anticipation of the civil penalty action against Americana and therefore would normally be privileged from discovery in civil litigation. Since Exemption 5 "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)), the FTC maintained that the documents sought by Grolier were exempt from disclosure under the FOIA.

After reviewing the documents in camera, the district court found (Pet. App. 23a) that they "encompass opinions by attorneys regarding the evidentiary needs of the Americana action" and that "[t]hey also discuss specific methods of obtaining evidence in that litigation." The court held (*ibid.*) that "the documents [fell] within the rubric of 'mental impressions, conclusions, opinions or legal theories'" under Rule 26(b)(3) of the Federal Rules of Civil Procedure and that they therefore fell within Exemption 5 of the FOIA.

A divided court of appeals vacated the district court's judgment regarding those four documents. The panel majority conceded that "[t]here is no question that the documents involved were work-product prepared as part of the *Americana* action" (Pet. App. 2a). However, the majority stated that the applicability of Exemption 5 of the FOIA depended upon "whether these documents continue to be privileged against disclosure several years after the *Americana* suit was terminated" (*ibid.*).

The court below noted (Pet. App. 3a-4a, quoting *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) (emphasis added in opinion)) that several courts of

appeals and district courts have held that "there is 'a *perpetual* protection for work product' extending beyond the termination of the litigation for which the documents were prepared." But the court concluded (Pet. App. 5a) that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." The court reasoned (*id.* at 6a) that effective legal representation would not be adversely affected by disclosure of attorneys' mental impressions, conclusions, opinions, or legal theories "[w]hen litigation has ended and no potential for related actions exists * * *." Accordingly, the court held (*id.* at 7a; emphasis in original) that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists."

Applying that test to the present case, the court of appeals rejected the suggestion that Grolier's FOIA suit constituted related litigation (Pet. App. 8a) and stated (*id.* at 7a) that "there does not appear to be any suit or potential suit related to the original *Americana* action." The court therefore remanded the case "for reconsideration of the applicability of the work-product privilege in light of the apparent absence of related litigation" (*id.* at 7a-8a).

Judge MacKinnon dissented. In his view, the Commission properly withheld the requested documents under Exemption 5 "because the termination of the litigation to which the work-product relates does not destroy this privilege" (Pet. App. 9a). Moreover, assuming that the work-product privilege were limited by a "related case" rule, Judge MacKinnon concluded that "the present suit could not be more directly related to the *Americana* litigation" (*id.* at 13a).

The court of appeals subsequently denied the government's suggestion for rehearing en banc by a vote of five to four (Pet. App. 19a-20a).

SUMMARY OF ARGUMENT

This is a Freedom of Information Act case in which respondent sought disclosure of work product prepared by Federal Trade Commission attorneys for a civil action that ended several years ago. The Commission denied disclosure on the ground that the documents were protected by the attorney work-product privilege and were accordingly exempt from disclosure under the FOIA by virtue of Exemption 5, 5 U.S.C. 552(b)(5). That exemption protects "memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." It is settled that this exemption was intended to protect the working papers of government attorneys. See *FOMC* v. *Merrill*, 443 U.S. 340, 353 (1979); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975).

The court of appeals nonetheless ordered the documents disclosed, holding (Pet. App. 7a; emphasis in original) that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists." This holding is clearly wrong.

1. The court of appeals' interpretation of the duration of the work-product privilege is not supported by precedent or logic. Certainly nothing in this Court's decisions or Fed. R. Civ. P. 26(b)(3), which codifies some aspects of the privilege, supports the view that the privilege ends upon the conclusion of the litigation for which it was prepared unless

related litigation "exists or potentially exists" (Pet. App. 7a). In addition, the interpretation of the privilege adopted by the court below has been rejected by three other courts of appeals that have considered the issue. *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977); *Duplan Corp.* v. *Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976); *United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977).

The decision below also is fundamentally inconsistent with the underlying purposes of the work-product privilege. As this Court has recognized, the disclosure of attorneys' working papers may seriously undermine the proper functioning of the adversary process. See *Upjohn Co.* v *United States*, 449 U.S. 383, 398 (1981); *United States* v. *Nobles*, 422 U.S. 225, 236-240 (1975); *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In preparing for litigation, an attorney must "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference" (*Hickman* v. *Taylor*, *supra*, 329 U.S. at 511). "This work is reflected * * * in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways * * *" (*ibid.*). If such materials were subject to disclosure, "much of what is now put down in writing would remain unwritten," and both "the interests of the clients and the cause of justice would be poorly served" (*ibid.*).

Subjecting the work-product privilege to the limitations imposed by the court of appeals would produce many of the deleterious consequences that the privilege was designed to prevent. The concepts of "related" litigation and litigation that "potentially exists" (Pet. App. 7a) are so vague that attorneys

would be unable to predict how they would be applied in particular cases. Cases may be "related" in innumerable ways. For example, they may involve similar facts, legal theories, parties, or other personnel. There are also infinite degrees of relatedness. At the very least, much litigation would be required to determine what is meant in this context by "related" cases, and we frankly doubt whether it would be possible to develop clear standards that would permit attorneys to predict when and under what circumstances their working papers might be ordered disclosed. The concept of related litigation that "potentially exists" is of even less practical utility. Attorneys and judges would have a difficult time indeed attempting to ascertain what future lawsuits may involve.

As a result of these ambiguities, cautious attorneys would be forced to assume that any working papers kept after the termination of the litigation for which they were prepared might be disclosed to adversaries and others. In many instances, attorneys would refrain from preparing or collecting work product that might prove damaging if released. In addition, many valuable files would likely be destroyed upon the conclusion of the litigation for which they were assembled. This would impair the effective representation of clients, make legal services more expensive, and interfere with the functioning of the legal system.

Applying the concepts of related and potential litigation would be particularly difficult in FOIA and other government cases. The volume of government litigation (and potential litigation) that would have to be surveyed is enormous, and most cases involving the same agency are related in many important respects. For example, they may involve the same statutory provisions, similar factual situations, similar

investigative strategies or practices, the same or similar adversaries, and the same agency personnel.

Assuming arguendo that attorneys had a rough idea of what was meant by "related" cases and cases that "potentially exist," attorneys' trial preparation and representation of clients might well be adversely affected by the knowledge that damaging work product would be discoverable in subsequent, unrelated cases. Certain work-product materials may be equally damaging no matter in what context they are disclosed. These include documents discussing materials that could prove harmful or embarrassing to a client, as well as documents that reflect unfavorably upon an attorney's performance. Anxious to prevent disclosure of such materials at any time, attorneys would probably refrain from preparing, collecting, or preserving many documents if they were discoverable in subsequent, "unrelated" cases.

2. Even if the court of appeals' decision correctly reflected the duration of the work-product privilege in civil discovery, the working papers of government attorneys would nevertheless be protected from disclosure under Exemption 5 of the FOIA.

First, Exemption 5 exempts those documents "normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149). Documents may be obtained despite that exemption only if they would " 'routinely be disclosed' in private litigation" (*id.* at 149 n.16, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)). Under the court of appeals' decision, however, work product from terminated litigation would be discoverable only if (a) it was sought in an "unrelated" case and there was no potential for related litigation or (b) the party seeking discovery was able to show a sufficient need for the materials. Accordingly, since

work-product materials from terminated cases would not "routinely be disclosed" in civil discovery but would be discoverable only under certain circumstances, those materials would be shielded by Exemption 5. Second, as Judge MacKinnon remarked in dissent (see Pet. App. 13a), an FOIA suit seeking work product from an earlier case is clearly "related" to the prior case. This is especially so where, as here, the party making the FOIA request was a party (or is the parent corporation of a party) in the previous action.

ARGUMENT

THE WORK PRODUCT OF GOVERNMENT ATTORNEYS IS PROTECTED FROM DISCLOSURE UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT AFTER THE CONCLUSION OF THE LITIGATION FOR WHICH THAT MATERIAL WAS PREPARED AND WITHOUT REGARD TO THE EXISTENCE OR POTENTIAL EXISTENCE OF RELATED LITIGATION

Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), protects from disclosure "memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption was clearly intended to protect the working papers of government attorneys from disclosure. The Senate Report states (S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965)) that the material protected by Exemption 5 "include[s] the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties."[4] This Court

[4] See also 110 Cong. Rec. 17667 (1976) (remarks of Sen. Long) ("[T]here is nothing in this bill which would override normal privileges dealing with the work product * * *.")

has also noted that it is "clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5." *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 154. See *FOMC* v. *Merrill*, 443 U.S. 340, 353, 357 (1979) (House and Senate Reports provide "unequivocal support for an Exemption 5 privilege for * * * attorney work product privileges").

Although Exemption 5 was meant to protect the work product of government attorneys from mandatory disclosure to the public, the court of appeals held that such materials lose their privileged status upon the termination of the litigation for which they were prepared unless the government is able to demonstrate that related litigation exists or potentially exists. This holding is erroneous for at least two reasons. First, the work-product privilege is not subject to such limitations, in either the civil discovery or the FOIA context. Second, even if such limitations exist in civil discovery, disclosure in a subsequent FOIA suit would not be warranted. Exemption 5 applies unless covered materials would " '*routinely* be disclosed' in private litigation" (*NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 149 n.16, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis added)), and even under the court of appeals' interpretation of the privilege, the working papers of government attorneys would not "routinely be disclosed" in civil discovery but could be obtained only in limited circumstances.

A. The work-product privilege continues despite the termination of the litigation for which it was prepared and even though no related litigation exists or potentially exists

As noted, the court of appeals held that the documents at issue in the present case, although concededly the work product of government attorneys (see Pet. App. 2a), were no longer protected by the work-product privilege because the litigation for which they had been prepared had ended and related litigation did not exist or "potentially" exist. There is no basis for these unprecedented limitations upon the work-product doctrine.

1. The attorney work-product privilege was first recognized by this Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), a Jones Act suit brought by the representative of a crewman drowned in a tugboat accident. After counsel for defendants, the tug owners and underwriters, had interviewed survivors of the accident, opposing counsel sought to obtain copies of any written statements provided by the survivors and also to compel defense counsel to "set forth in detail" any oral statements the survivors had made (*id.* at 498-499). This Court held that the written and oral statements were privileged and refused to permit their discovery.

The decision in *Hickman* was based upon the recognition that discovery of attorney work product would interfere with sound trial preparation and thereby undermine the adversary process. The Court stated (329 U.S. at 510-511):

> In performing his various duties * * *, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper

> preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

The Court added, however, that the work-product privilege is not absolute. The Court stated (329 U.S. at 511-512) that "written materials obtained or prepared * * * with an eye toward litigation" may be discovered upon a showing of necessity. On the other hand, the Court observed (*id.* at 512-513), the "mental impressions" of counsel may be discovered, if at all, only in "rare" circumstances.[5]

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[5] Some courts have held that this aspect of the privilege is absolute. See, *e.g.*, *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973). See also Fed. R. Civ. P. 26(b)(3).

The considerations that led this Court to recognize the work-product privilege apply with particular force in the case of government attorneys. The working papers of government lawyers may be sought, not only in civil discovery, but under the FOIA as well. Yet, government attorneys are far more likely to be dependent upon the existence of comprehensive written files than most of their counterparts in private practice: government cases tend to be larger and to last longer; government attorneys tend to be more transient; coordination of the positions taken in many varieties of cases is of unusual importance; and maintaining supervision and coordination in an organization as vast and complex as the United States government naturally requires great reliance upon past records.

The strong public policy underlying the work-product doctrine has been repeatedly reaffirmed by this Court. See, *e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 398 (1981); *United States* v. *Nobles*, 422 U.S. 225, 236-240 (1975). That policy has also been embodied in Federal Rule of Civil Procedure 26 (b)(3), which provides in pertinent part:

> (3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative * * * only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Nothing in this Court's decisions or in Rule 26(b)(3) suggests that the work-product privilege terminates with the conclusion of the litigation that gave rise to the work product. On the contrary, Rule 26(b)(3) by its terms protects "documents and tangible things * * * prepared *in anticipation of litigation or for trial*" (emphasis added) and not just those prepared in anticipation of or for the suit then before the court. Nor is there a hint in this Court's decisions or in Rule 26(b)(3) that the privilege survives the termination of the suit for which the work product was prepared only if related litigation "exists or potentially exists" (Pet. App. 7a), whatever that may mean.[6]

With the exception of the court below, all the courts of appeals that have reached the issue have held that work product from terminated litigation remains privileged in subsequent, unrelated cases. In *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483-484 (4th Cir. 1973), the court concluded that perpetual protection for work product best comports with the rationale of *Hickman* and explained (*id.* at 483):

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[6] Indeed, the perpetual nature of the work-product privilege is an implicit premise of the Court's analysis in *NLRB* v. *Sears, Roebuck & Co., supra*. In that case, Sears filed a FOIA request seeking, among other things, intra-agency memoranda of the NLRB directing the filing of a complaint. Many such memoranda pertained to "cases which had been closed * * * because litigation before the Board had been completed" (421 U.S. at 145). However, the Court did not distinguish between open cases and closed cases but rather concluded (*id.* at 159-160) that all such memoranda had been "prepared in contemplation of the upcoming litigation [and therefore fell] squarely within Exemption 5's protection of an attorney's work product."

> [*Hickman's*] overriding concern is that the lawyer's morale be protected as he performs his professional functions in planning litigation and preparing his case. This work product immunity is the embodiment of a policy that a lawyer doing a lawyer's work in preparation of a case for trial should not be hampered by the knowledge that he might be called upon at any time to hand over the result of his work to an opponent.

The Fourth Circuit specifically rejected the suggestion that "documents prepared for one case are protected in a second case only if the two cases are 'closely related' " (*id.* at 484 n.15). The court stated (*ibid.*) that "to dispose of this delicate and important question by such a technical touchstone is incompatible with the essential basis of the *Hickman* decision." See also *Duplan Corp.* v. *Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975).

The Sixth Circuit followed the Fourth in *United States* v. *Leggett & Platt, Inc.*, 524 F.2d 655 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977). In that case, the government initiated a civil antitrust action to require a manufacturing company to divest itself of two other recently acquired firms in the same industry, and the defendant company then sought discovery of work product prepared by government lawyers in anticipation of litigation concerning similar acquisitions by other companies in that industry. Holding that work product retains its protection when sought in subsequent cases, the court stated (*id.* at 660):

> Were the work product doctrine an unpenetrable protection against discovery, we would be less

> willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery, at least of products other than [opinion work product].

Finally, in *In re Murphy*, 560 F.2d 326 (8th Cir. 1977), the Eighth Circuit reached a similar conclusion. Rejecting the view that the work product privilege applies only in the very case for which the materials were prepared or in a "related" case, the court reasoned (*id.* at 335; footnote omitted):

> If work product is protected in related, but not unrelated future cases, an attorney would be hesitant to assemble extensive work product materials because of the concern that the materials will not be protected in later, unrelated litigation. The unrelatedness of the subsequent litigation provides an insufficient basis for disregarding the privilege articulated in *Hickman* and incorporated in Rule 26(b)(3). The mischief engendered by allowing discovery of work product recognized in *Hickman* would apply with equal vigor to discovery in future, unrelated litigation.

In the present case, the court of appeals purported to find support for its decision in the purpose of the work-product privilege (see Pet. App. 6a). It seems clear, however, that the policy underlying the privilege would be poorly served if subjected to the constraints imposed by the decision below. We will first discuss whether there is any justification for holding that the work-product privilege automatically dissolves upon the conclusion of the litigation in connection with which it was originally prepared. We will then address the two additional refinements adopted

by the court of appeals—*i.e.*, the "related" litigation and "potential" related litigation tests.

2. Little discussion is required to demonstrate that the policy underlying the work-product doctrine would be seriously eroded if the privilege immediately evaporated upon the termination of the litigation in connection with which it was prepared. We readily acknowledge that the need to shield work product is usually strongest during the pendency of that litigation, for the more immediate the threat of disclosure the greater the effect upon an attorney's preparation and overall representation is likely to be. But common sense suggests that the possibility of disclosure at some future date may also have a highly deleterious effect upon an attorney's preparation and representation and consequently upon the adversary process.

This may be illustrated by considering a slight variation of the situation in *Hickman*. In that case, five crewmen drowned in a tugboat accident, but representatives of four eventually settled their claims. As previously noted, the representative of the fifth crewman filed suit and sought discovery of the witness statements obtained by defense counsel. This Court refused to allow discovery of those statements, which constituted work product gathered in preparation for the case before the Court.

Suppose, however, that the other four crewmen, rather than settling their claims, had decided to wait until after the initial action ended before bringing suit. Under those circumstances, it could hardly be argued that the policy underlying the work product privilege would be adequately served if the privilege terminated upon the completion of the initial suit. If the preparation of defendants' counsel would have been adversely affected by the knowledge that his

work product might be revealed during the first suit, the realization that the same materials might be disclosed in the subsequent actions almost certainly would have had an equivalent effect.

To take another example, suppose that the complaint in *Hickman* had been dismissed on grounds that did not bar reinstitution of suit—for example, for lack of in personam jurisdiction or venue or because suit was brought under the wrong statute or legal theory. Surely the policy underlying the work-product privilege would demand continued protection of work product prepared in connection with the first, aborted proceeding.

Even where the likelihood of subsequent related litigation is not as strong as it is in the above examples, an attorney's preparation and representation might be affected significantly and adversely if he knows that his work product may be disclosed upon the conclusion of the suit at hand. For example, sound trial preparation often requires an attorney to probe all possible weaknesses in his client's case. An attorney may consequently find it necessary or helpful to prepare memoranda discussing materials that reflect unfavorably upon his client, such as materials that might be used to cross-examine or impeach his client or other persons whom the attorney is contemplating calling as witnesses. An attorney may believe that only by collecting and evaluating such materials can he intelligently make or advise his client concerning numerous litigation decisions, such as whether to file suit, whether to settle a pending action, whether to assert a particular claim or defense, which witnesses to call at trial, and which items of evidence to introduce. However, if an attorney believed that documents discussing materials damaging to a client might be disclosed upon comple-

tion of the case at hand, the attorney's trial preparation could well be altered. Potentially damaging information might not be collected, examined, or reduced to writing. The attorney and his client might therefore be required to make critical litigation decisions and perhaps proceed to trial without the benefit of the preparation that the attorney would otherwise deem essential. Both the interest of the client and the adversary process would suffer as a consequence.

If the court of appeals' decision is affirmed, attorneys' trial preparation might be altered not only to protect their clients but also to protect themselves. If work product lost all protection following the conclusion of the case for which it was prepared, attorneys might hesitate to prepare or retain materials revealing or acknowledging their own mistakes. This too would have undesirable consequences, because a frank assessment of the conduct of litigation may benefit both an attorney's client and society's larger interests. A recognition of past errors may permit their correction or may lead to the conclusion that proposed litigation should not be initiated or that pending litigation should be settled or dismissed. Yet many attorneys, both in government and private practice, would probably be much more reluctant to engage in candid analysis of their own performance or that of their colleagues if materials containing such analysis were subject to disclosure at the conclusion of the pending litigation.

By the same token, if the attorney work-product privilege dissolved upon the completion of the litigation for which the requested materials were prepared, valuable files might well be destroyed at that time to prevent possible future disclosure. Many irreplaceable documents would be lost, and other documents destroyed at the conclusion of one case would have

to be prepared or gathered again when subsequent cases arose. The efficient functioning of the legal process would accordingly be hampered.

In sum, it seems obvious that the strong public policy underlying the work-product doctrine would be frustrated if the privilege automatically dissolved upon the completion of the litigation for which the work-product materials were prepared. If the privilege were limited in that fashion, "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511. On the other hand, recognizing that the work-product privilege is not subject to temporal restraints would not create undue hardship for civil litigants because, at least with respect to non-opinion work product, the privilege may be overcome where sufficient need for the materials is shown.

3. The court of appeals introduced two qualifications designed to soften the impact of the rule that work product loses all protection upon the conclusion of the case for which it was prepared. The court concluded that the work-product privilege could survive the termination of the original litigation if (a) related litigation is in existence or (b) there is a potential for such litigation. However, neither of these qualifications is workable or comports with the rationale for the privilege.

What the court of appeals meant by "related" litigation is far from clear. Cases may be related in

countless ways. For instance, they may involve similar facts; the same or similar investigative techniques, causes of action, or defenses; or the same lay or expert witnesses, investigators, trial attorneys, or supervisory personnel. There are also infinite degrees of relatedness. The very fact that work product prepared for one case is relevant and hence potentially discoverable in another case (see Fed. R. Civ. P. 26 (b)(1)) suggests that the two cases are related in at least one significant respect.[7]

Application of the concept of related litigation would be particularly difficult in cases involving government agencies. Because of their continuing enforcement responsibilities, many federal agencies are almost constantly engaged in litigation involving the same laws; recurring factual situations; the same or similar opposing parties; the same investigative, trial, and supervisory personnel; analogous enforcement decisions; and the same or similar investigative and litigative strategies or techniques. Thus, cases involving such agencies are typically related in many significant ways, and disclosure of work product from cases long since closed may reveal privileged information of considerable value to regulatees and potential adversaries. In addition, the sheer volume of cases involving government agencies would compound the difficulty of ascertaining whether any are related to

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[7] For an illustration of some of the ways in which cases may be related, see Rule 13(b)(4) of the Rules of the United States Court of Appeals for the Ninth Circuit, which requires parties to state whether any "related" cases are pending before the court. Under this rule, cases may be deemed related if, among other things, they "involve the same or closely related issues," "involve the same basic transaction or event," or "have any other similarities of which you think the Court should be aware."

the litigation for which the work product at issue was created.

For the courts that will ultimately be required to adjudicate work-product disputes, the related litigation test would create the difficult, if not impossible, task of specifying what sort of relationship is required and just how close the relationship between cases must be before they are deemed to be related. At the very least, developing such standards would take many years and much litigation, and we frankly doubt whether it would ever be possible to articulate clear standards capable of producing predictable results. Of course, if attorneys cannot predict what would be deemed "related" litigation for these purposes, they would not know if, when, and under what circumstances their work product may be ordered disclosed. Collecting and preserving potentially damaging or embarrassing work-product materials would accordingly be a risky undertaking from which many cautious attorneys might elect to refrain. As this Court has observed (*Upjohn Co.* v. *United States*, *supra*, 449 U.S. at 393), "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Even if attorneys had a rough idea what might later be deemed "related" litigation, their trial preparation and overall representation might well be adversely affected by the knowledge that disclosure of damaging work product might be ordered in subsequent unrelated cases. Although the court of appeals did not explain the conceptual basis for the related litigation test, in order to comport with the policy underlying the work-product privilege that test would have to rest upon the premise that disclosure of work

product in or during the pendency of related litigation is likely to have a greater adverse impact upon attorneys' trial preparation and representation than is disclosure in or during unrelated suits. This could be so for two reasons: (a) it could be argued that attorneys are more likely to foresee (and thus fear) the possibility of disclosure during subsequent related cases; and (b) it could be argued that disclosure during the pendency of such suits is likely to be more damaging to attorneys and their clients.

If this is indeed the underlying rationale of the related litigation test, we question the validity of the broad, unsubstantiated generalizations upon which it is based. While there are undoubtedly circumstances in which subsequent related cases may be foreseen, there are also many circumstances in which it is apparent to attorneys that work-product materials gathered for one case may be relevant to and sought in other cases that may be deemed unrelated. In addition, the very fact that such materials are sought by an opposing party in civil discovery and are found to be relevant to that suit is some evidence that their disclosure may not be innocuous. Furthermore, it seems obvious that revelation of certain work-product materials may be equally damaging no matter what the context in which they are disclosed. For example, documents discussing materials that could be used to impeach a particular client in one case might alert an adversary to the possibility of using those materials for the same purpose in a subsequent, unrelated case. Documents containing information that would damage the business or personal reputation of a client if made public might be just as harmful if revealed in an unrelated as opposed to a related suit. And materials that reflect unfavorably upon an attorney's performance would be equally damaging

without regard to the nature of the case in which their disclosure is ordered.

Finally, the related litigation test is fatally flawed because subsequent unrelated litigation may precede suits intimately related to the case in connection with which the work-product materials were prepared. Disclosure of those materials in the unrelated suit would mean that they will be available to adversaries in the related cases not yet begun.

4. Apparently recognizing that the "related litigation" test is inadequate, the court of appeals added that the work-product privilege continues as long as there is a "potential" for related litigation. In our view, the concept of whether related litigation "potentially exists" is meaningless for all practical purposes. To be sure, there are undoubtedly instances in which the possibility of subsequent related litigation is clear —for example, where an action is dismissed without prejudice—but absent such circumstances it is hard to imagine how a court would go about determining whether there is a "potential" for related litigation.[8]

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[8] In the present case, the court of appeals concluded (Pet. App. 7a) that "there does not appear to be any suit or potential suit related to the original *Americana* action." However, the court reached that conclusion by misconstruing and taking out of context a statement made by the FTC in papers supporting its motion for summary judgment. Pursuant to a provision of the local rules and customary local practice, petitioners stated (J.A. 29; emphasis added):

> Plaintiff Grolier, is also plaintiff in a proceeding to review an order of the Commission, Grolier Incorporated v. Federal Trade Commission, now pending in the U.S. Court of Appeals for the Ninth Circuit (No. 72-2159). *The action in the Ninth Circuit is not directly related to this action.*

The obvious reason for requiring such a statement in papers supporting a summary judgment motion is to allow the court

Indeed, in our litigious society, what sort of litigation does not "potentially exist" at any time? Moreover, the concept of litigation that "potentially exists," like the concept of related litigation, would be particularly difficult to apply in government cases. Because of the enormous volume of government litigation, surveying all cases in the offing would be a Herculean chore. And no attorney could accurately predict what even a single agency such as the FTC is likely to investigate in the future, where those investigations are likely to lead, and what sort of litigation may ultimately result.

Thus, the rule adopted by the court of appeals in this case would seriously undermine the important public policy underlying the work-product privilege. Attorneys preparing for trial would be unable to predict when or if potentially damaging work-product materials might be ordered disclosed, and they would have little assurance that such materials, if prepared or collected, would not work to the detriment of their clients or themselves. The results would be precisely those this Court sought to avoid in *Hickman*.[9]

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to ascertain whether a consolidation of actions is appropriate, whether any of the claims asserted are controlled by res judicata or collateral estoppel, and whether the decision in the case at hand will affect any other pending litigation. Petitioners' statement obviously was not made with the court of appeals' "related litigation" test in mind. By seizing upon petitioners' statement, which as noted was made in an entirely different context, the court of appeals masked the difficulty of determining whether pending cases, not to mention potential cases, are related within the meaning of the court's test.

[9] It is generally recognized that the policies and needs underlying the attorney work-product privilege are closely allied to those of the attorney-client privilege. McCormick,

5. We have already touched upon the reasons why continuing protection for work product is especially important in government litigation and why the concepts of "related" and "potential" litigation would be particularly unworkable in this context. For many of these same reasons, we believe that even if the work product of private attorneys were subject to temporal restraints, continuing protection for the work product of government attorneys would be required.

Unlike most private litigants, many government agencies exist in large measure for the purpose of litigating in either administrative or judicial proceedings. In addition, most government agencies have specialized enforcement and litigative responsibilities. Accordingly, they may participate over the years in a large number of cases involving the same laws and similar factual patterns, investigative techniques, evidentiary problems, and trial strategies and decisions. Work product prepared for prior cases is "closed" in only the most technical sense; it may reveal how the agency customarily deals with recurring legal problems and therefore may be valuable to regulatees and actual or potential adversaries for reasons that are seldom applicable with respect to the work product of private attorneys. To take one example, in *United States* v. *Leggett & Platt, Inc.*, *supra*, in which the Sixth Circuit held that work product is perpetually protected, the company against which the government had initiated a civil antitrust action sought discovery

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Evidence § 96 (2d ed. 1972). It is therefore significant that the attorney-client privilege survives the termination of the attorney-client relation that it is intended to serve (see, *e.g.*, *United States* v. *Foster*, 309 F.2d 8, 15 (4th Cir. 1962)) and even the death of the client (see, *e.g.*, *In re Busse's Estate*, 332 Ill. App. 258, 266, 75 N.E.2d 36, 39 (1947)).

of work product prepared by government attorneys in anticipation of the same type of litigation with other firms in the same industry. If those materials had been ordered disclosed, the defendant company might have gained much valuable information about the investigative and litigative strategies customarily employed by the government in cases of that sort. By contrast, if the antitrust action had been filed by a private party, it is doubtful whether disclosure of work product from any past case in which that party had been involved would yield similar fruit. And unless the defendant company had previously defended a similar suit, it is doubtful as well that the government could have obtained information concerning the defendant's investigative or litigative techniques by seeking discovery of work product from cases in which it was previously involved.

The need to prevent disclosure of materials reflecting intra-agency advisory opinions, recommendations, and deliberations also finds expression in the government's deliberative process privilege, which is not subject to temporal restraints. See *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149-151. This privilege, which is embodied in Exemption 5, of course may not be claimed by private parties. "[T]he ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions," since such decisions "will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made" (*id.* at 151). This same objective demands continuing protection for much government work product prepared for past cases. Since materials reflecting intra-agency deliberations concerning recurring litigative problems would be perpetually

privileged, it would be anomolous indeed if a government attorney's file memoranda concerning the same issues lacked similar protection or if confidential materials reflecting how such problems were approached in practice were freely discoverable following the conclusion of the litigation for which they were prepared and all "related" litigation and potential litigation. See *Department of State* v. *Washington Post Co.*, No. 81-535 (May 17, 1982), slip op. 6; *FBI* v. *Abramson*, No. 80-1735 (May 24, 1982), slip op. 12-13.

In sum, the work product of government attorneys is fundamentally different from that of private practitioners and demands continued protection even if private attorneys' work product is subject to temporal limitations.

6. We have thus far addressed the application of the court of appeals' test in the civil discovery context. In a Freedom of Information Act case, like the present suit, that test makes even less sense.

Applying its test in the FOIA context, the majority of the court of appeals held that a FOIA suit seeking work product from a terminated case may not be regarded as "related" litigation and that the applicability of the work-product privilege in the FOIA suit depends upon the fortuity of whether other litigation related to the original action is then pending or "potentially exists." We find this approach puzzling.

First, we do not understand why a FOIA suit seeking documents from a terminated case should not be regarded as related litigation. See Pet. App. 13a (MacKinnon, J., dissenting). Since the documents sought in the FOIA suit would not have been created or assembled were it not for the first action, the two cases would appear to be closely related in the

usual sense of that term. This conclusion also seems consistent with the apparent rationale for the related litigation test. As previously noted, if there is any basis for that test, it is that disclosure of work product in a related case is more likely to be foreseen and to cause damage to an attorney and his client than is disclosure in an unrelated suit. Judged by these criteria, FOIA suits seeking work product from terminated cases fully qualify as related litigation. The filing of a FOIA request—a simple, inexpensive procedure—is much more likely and foreseeable in most circumstances than the filing of a civil complaint and the pursuit of work product through civil discovery.

In any event, even if not all FOIA suits seeking work product from terminated cases may be regarded as "related" litigation, there is surely no justification for holding that a FOIA suit may never be a "related" case (see Pet. App. 8a). For example, where, as here, documents are sought by the opposing party in the prior suit or its corporate parent, it seems plain that the two actions are closely related.

7. The court of appeals attempted to bolster its interpretation of the work-product privilege by relying upon what it characterized as a "substantial body of case law [that] supports the conclusion that the work-product privilege extends to subsequent cases *only when* they are related" (Pet. App. 4a; emphasis added). However, none of the cases cited by the court of appeals reached that question. In each of those cases, discovery of attorney work product in a related case was denied. See *Republic Geo[illegible] Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967); *Hercules Inc.* v. *Exxon Corp.*, 434 F. Supp. 136, 153 (D. Del. 1977); *Midland Investment Co.* v. *Van*

Alstyne, Noel & Co., 59 F.R.D. 134, 138 (S.D N.Y. 1973); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 275 F. Supp. 146, 148 (E.D. Pa. 1967). Indeed, none of those cases even contains dictum embracing the court of appeals' position.[10] And

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[10] In *Republic Gear Co.*, the Second Circuit declined to permit discovery of work product prepared for related cases then pending on appeal. The court distinguished the case before it from district court cases involving work product from completed litigation (381 F.2d at 557 & n.5), but the court did not state that it would have allowed discovery if the previous litigation had been completed or was unrelated to the case at hand.

The three district court cases cited by the court of appeals held that work product from previous related cases is not discoverable. Those cases did not state that work product from previous unrelated cases is discoverable.

As the court of appeals observed (see Pet. App. 3a), some district courts have "concluded that the work-product privilege applies only if the materials were prepared in anticipation of the very suit before the court." As previously discussed, however (see pages 18-21, *supra*), such a rule would lead to absurd results. Moreover, as the five examples cited by the court illustrate (see Pet. App. 3a), the cases adopting such a rule are devoid of analysis and rely uncritically upon prior district court authority. The most recent district court case cited in the opinion below, *United States* v. *IBM*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974), relies solely upon a quotation from *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970), and the latter case contains no analysis but merely cites two of the other cases noted by the court of appeals, *i.e.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 207 F. Supp. 407, 410 (M.D. Pa. 1962), and *Tobacco and Allied Stocks, Inc.* v. *Transamerica Corp.*, 16 F.R.D. 534, 537 (D. Del. 1954). *Hanover Shoe* relies (207 F. Supp. at 410) in turn solely upon *Tobacco and Allied Stocks* in which the court reached its conclusion (16 F.R.D. at 537) by incorrectly reading *Rediker* v. *Warfield*, 11 F.R.D. 125 (S.D.N.Y. 1951). *Rediker* concerned material that had

none of those cases or any other case of which we are aware adopted or approved the "potential" litigation test.[11]

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not been prepared in anticipation of any litigation and thus was not work product at all (*id.* at 128).

The remaining district court decision cited by the court of appeals, *Gulf Construction Co.* v. *St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D. Tex. 1959), relies solely upon the fact that "*Hickman* v. *Taylor* involved the discovery and production of statements of witnesses acquired by counsel in anticipation of the litigation then before the court."

[11] The commentators cited by the court of appeals (see Pet. App. 4a) also provide no analytical support for the court's decision. The court relied upon 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024 at 201 (1970), but that passage merely states without elaboration that the "sounder view" is that work product does not lose all protection at the termination of the litigation for which it was prepared but instead remains privileged in subsequent cases "*at least* if the two cases are closely related" (emphasis added). In 4 J. Moore, *Federal Practice* ¶ 26.64[2] at 26-415 (1982), it is stated that "[p]rior to the 1970 amendments [to Fed. R. Civ. P. 26(b)(3)], the question as to whether the papers in one action were to be considered 'work product' for purposes of a subsequent one, turned on whether the first action was complete and upon the relationship between the first and second actions." This statement was merely an attempt to summarize the holdings of various lower court decisions prior to 1970 and did not take into consideration the decisions of three courts of appeals after 1970 holding that work product is perpetually privileged in civil discovery. Moreover, for reasons previously explained (see pages 31-32 & n.10, *supra*), the accuracy of that summary is questionable. The final commentator cited by the court of appeals (Cooper, *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269, 1299 n.100 (1969)) merely states in a footnote and without any supporting analysis that the work-product privilege should terminate "only when there is no danger of disclosure to others pursuing claims related to the claims involved in the litigation giv-

The remainder of the court of appeals' analysis is equally unpersuasive. The court stated (Pet. App.

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ing rise to the one-time work product materials." As we have argued, there is almost always some danger that disclosure of the work product of government attorneys will assist potential adversaries or regulatees.

The question involved in this case has attracted surprisingly little additional academic comment. One student commentator concluded that cases recognizing a perpetual work-product privilege that may be overcome in cases of demonstrated need maintain "the delicate balance between reasonable inquiry through discovery and the privacy and professional integrity of the adversary system." Comment, *Civil Procedures—Discovery—Work-Product Privilege Extends to Subsequent Litigation*, 27 Vand. L. Rev. 826, 833 (1974). Another student note on the issue (Note, *Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 Duke L. J. 799) proposes the following test: "Under the circumstances existing at the time of the preparation of the initial suit, would there have been in the mind of a reasonable attorney a belief that there was a substantial probability of *significant* subsequent litigation to which his present work product would be relevant" (*id.* at 820; emphasis in original). This test, however, is subject to many of the same objections as the "related" and "potential" litigation tests. As the student commentator recognized (*id.* at 821), no attorney could predict with confidence what a court might view as "significant" litigation or a "substantial probability." Moreover, an attorney's trial preparation and representation might well be adversely affected by the knowledge that there was a chance (although something less than a "substantial probability") that such materials might be ordered disclosed. In Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1044 (1961), it is stated without analysis or elaboration that the work-product privilege should continue "so long as a likelihood of litigation remains." However, since the disclosure of work product, whether through civil discovery or the FOIA, may only be ordered in subsequent litigation, the import of this statement is unclear.

5a) that "[e]xtending the work-product protection only to subsequently related cases best comports with the fact that the privilege is qualified, not absolute." But simply because the privilege is qualified in one respect—*i.e.*, some privileged materials may be obtained in civil discovery where sufficient need is shown (see Fed. R. Civ. P. 26(b)(3))—it does not follow that the privilege must be qualified in every other respect as well. Merely because a particular litigant's need for privileged materials may justify disclosure, it does not follow that the interests served by the privilege lose all force "[w]hen litigation has ended and no potential for related actions exists" (Pet. App. 6a).

The court next stated (Pet. App. 6a, quoting *Jordan* v. *U.S. Department of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978); citations omitted; emphasis in original):

> The purpose of the privilege * * * "is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary * * *" Therefore, in order to fall within the scope of the privilege a document "*must* 'relate to the conduct of either ongoing or prospective trials * * *.'" [12]

[12] The quotation from *Jordan* that work product must "relate to the conduct of either ongoing or prospective trials" (591 F.2d at 775-776) is taken out of context in the panel opinion, and its meaning is distorted. The point the *Jordan* court was making was that certain documents were not work product because they were not "prepared in anticipation of a particular trial" or "of trials in general" but "were promulgated as general standards to guide the Government lawyers" (*id.* at 775). The quoted sentence meant that a document cannot be work product unless, when made or compiled, it re-

This is faulty logic. As we have argued, a lawyer's fears about the possibility that his files may be disclosed after all related proceedings have terminated might discourage him from amassing materials in preparation for trial or preserving those files after the case has ended. As a result, "effective legal representation within the framework of the adversary system" would be undermined.

Finally, the court stated (Pet. App. 6a; emphasis in original):

> Moreover, we deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act request. Here, the presumption in favor of disclosure is at its zenith. "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 361 * * * (1976).

This reasoning is also fallacious. Just because "disclosure, not secrecy, is the dominant objective of [FOIA]," it does not follow, as respondent maintains (see Br. in Opp. 10) and the court below suggested, that greater disclosure should be available in a FOIA suit than in civil discovery. On the contrary, as we will show, such an interpretation of the FOIA would contravene both the plain language and legislative history of Exemption 5 (see *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149); *FOMC* v. *Merrill*, *supra*, 443 U.S. at 353) and would produce absurd results.

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lated to "ongoing or prospective trials" (*id.* at 775-776). There is no question that the documents at issue here were prepared in contemplation of specific litigation and accordingly were covered by the work-product privilege at least initially.

B. Even if work product may be disclosed in civil discovery when the case for which it was prepared has ended and no related case exists or potentially exists, the work product of government attorneys is nevertheless exempt from mandatory disclosure under the FOIA

As previously noted, the work-product privilege is qualified in civil discovery. Facts in an attorney's file that are "essential to the preparation of [an adversary's] case" may be discovered upon a showing of necessity. Fed. R. Civ. P. 26(b)(3); *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511. However, "[i]n ordering discovery of such materials when the required showing has been made," courts must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney * * * concerning the litigation" (Fed. R. Civ. P. 26(b)(3); see also Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C. App. at 442; *Upjohn Co.* v. *United States*, *supra*, 449 U.S. at 399-401). Because the work-product privilege is qualified, the particular circumstances of the party requesting discovery—for example, the party's need for the material in preparing his case—are an important factor in determining whether the privilege will be honored. Moreover, in civil discovery, a court may enter a protective order permitting disclosure of work product only to particular persons and "only on specified terms and conditions" (Fed. R. Civ. P. 26(c)(2)).

Under the FOIA, by contrast, such an individualized approach is not possible. The FOIA does not "by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). Instead, the FOIA requires information subject to

disclosure to be made "available to any person" (5 U.S.C. 552(a)(3)), and a large percentage of FOIA requests are made by firms and individuals acting in a representative capacity precisely so that the identity of the person, company, or organization seeking the information will not be known. For these reasons, "at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies." *EPA* v. *Mink*, *supra*, 410 U.S. at 86. Accordingly, in *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149, this Court held that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." The Court carefully emphasized (*id.* at 149 n.16) that "it is not sensible * * * to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." Rather, the question is whether the information sought would " 'routinely be disclosed' in private litigation" (*ibid.*, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)).

The reason for this construction of Exemption 5 is obvious. If, for example, a person making an FOIA request for work-product materials were deemed to stand in the shoes of a hypothetical civil litigant capable of demonstrating a compelling need for disclosure, the qualified work-product privilege recognized in civil discovery would be rendered meaningless in government litigation. Any civil litigant unable or unwilling to make the showing required for discovery of work product under Fed. R. Civ. P. 26(b)(3) could simply file an FOIA request, and he would automatically be treated as if such a showing had been made. In order to prevent such incongruous results, persons filing FOIA requests must be treated like civil litigants with the least compelling claim for

disclosure, *i.e.*, litigants incapable of showing any special need for the documents sought. Such persons are accordingly entitled to only those materials that would be available in civil discovery based upon a simple showing of relevance (Fed. R. Civ. P. 26(b)(1)). In other words, they are entitled to only those documents that would " 'routinely be disclosed' in private litigation" (*NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149 n.16, quoting H.R. Rep. No. 1497, *supra*, at 10).

Applying this teaching to the question presented by the instant case yields a result precisely opposite to that reached by the court of appeals. Of course, if the work-product privilege is perpetual in the context of civil discovery, then work product from terminated litigation would not be available under the FOIA regardless of whether there was any potential for related litigation. But even if, as the court below suggested (Pet. App. 4a), "the work-product privilege extends to subsequent cases only when they are related," it would not follow that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists" (*id.* at 7a; emphasis in original). On the contrary, work product from terminated litigation would not be "routinely" available in civil discovery because it would be available only (a) in unrelated cases where there was also no potential for subsequent related cases or (b) where sufficient need could be shown. As noted, in order to preserve the limitations imposed upon the disclosure of work product in civil discovery, a person seeking such material pursuant to an FOIA request must be deemed to stand in the shoes of a hypothetical civil litigant with the least compelling claim for disclosure—in this

instance, a litigant in a related case who is unable to demonstrate special need for the documents. Consequently, even if the work-product privilege is subject to the limitations suggested by the court of appeals, the work product of government attorneys would be protected under Exemption 5 of the FOIA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 82-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, et al.,

Petitioners,

v.

GROLIER INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Exemption 5 of the Freedom Of Information Act (5 U.S.C. §552(b)(5)) exempts from disclosure documents prepared by an attorney which a district court has already ordered produced pursuant to a civil discovery request?

2. Whether Exemption 5 shields from disclosure documents prepared by an attorney which relate to unauthorized and unethical investigative tactics?

3. Whether Exemption 5 mandates disclosure of documents describing long-abandoned covert investigative techniques, where the action for which the documents were written has been dismissed with prejudice due to non-compliance with a discovery order requiring production of those documents, and where no related or potentially related litigation exists?

PARTIES TO THE PROCEEDING

The respondent in this proceeding is Grolier Incorporated, including all its wholly-owned subsidiaries or affiliates, such as the Americana Corporation.

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Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir.), *cert. denied*, 420 U.S. 997 (1975)	24
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Fonda v. CIA, 434 F.Supp. 498 (D.D.C. 1977)	21-22
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In re Murphy, 560 F.2d 326 (8th Cir. 1977)	17,37
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Tax Reform Research Group v. IRS, 419 F.Supp. 415 (D.D.C. 1976)	15
Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657 (6th Cir. 1972), *aff'g* 341 F.Supp. 1013 (M.D.Tenn. 1971)	30

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Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D.Va. 1975)	30
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Cooper, *Work Product of the Rulemakers*, 53 Minn.L.Rev. 1269 (1969)	27-28,31
Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columb. L. Rev. 527 (1947)	9
La France, *Work-Product Discovery: A Critique*, 68 Dick.L.Rev. 351 (1964)	28
Toran, *Information Disclosure in Civil Actions: The Freedom Of Information Act And Federal Discovery Rules*, 49 Geo.Wash.L.Rev. 843 (1981)	22
Note, *Developments In The Law—Discovery*, 74 Harv.L.Rev. 904 (1961)	30
Note, *Discovery Of An Attorney's Work Product In Subsequent Litigation*, 1974 Duke L.J. 799	27

No. 82-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, et al.,

Petitioners,

v.

GROLIER INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioners ask the Court to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, which held that Exemption 5 of the Freedom Of Information Act (5 U.S.C. 552(b)(5)) does not permit the withholding of documents written by government attorneys for litigation which has been terminated, where no related or potentially related litigation exists. Instead, petitioners would have the Court construe that portion of the attorney work product rule encompassed by Exemption 5 of the Freedom Of Information Act ("FOIA") so that if a document could ever be immune from civil discovery in the case for which it was written, it must *always* fall within Exemption 5 of the FOIA, even if that prior case has terminated and no related or potentially related litigation exists.

The unique set of facts which led to respondent Grolier Incorporated's ("Grolier") FOIA request is set forth in the portion of Document "1" of the Federal Trade Commission's ("FTC") Index To Documents which was disclosed by the FTC in response to that request. Joint Appendix ("J.A.") 38-44. On February 29, 1972, the FTC filed a civil penalty action in the United States District Court of New Jersey, captioned *United States v. Americana Corporation*, Civ.No. 388-72 (D.N.J.). The FTC charged that Grolier's subsidiary, the Americana Corporation ("Americana"), violated a 1948 cease and desist order by making misrepresentations regarding its encyclopedias in its advertisements and door-to-door sales.

While that proceeding was pending, Kent C. Howerton, an attorney at the FTC's Division of Compliance of the Bureau of Consumer Protection in charge of the *Americana* litigation, in a memorandum dated April 4, 1973, "requested that the Commission's New York Regional Office conduct a supplemental investigation by having an attorney or CPS [Consumer Protection Specialist] enroll in the sales personnel training course at one of [Americana's] sales offices without identifying himself or herself as an employee of the Commission to obtain evidence concerning the sales training materials and instructions then being given to [Americana's] sales trainees." J.A. 42-43. This memorandum, containing instructions to carry out

a covert investigation through surreptitious employment of an agency investigator by respondent's subsidiary after a complaint in a civil penalty action had already been filed, is one of the alleged work product documents which petitioners have withheld.[1] The proposed supplemental investigation was conducted; an FTC investigator named Wendell Reid was hired by Americana and proceeded to spy upon its activities while pretending to be a sales trainee.

"Following a public announcement by the Commission that it was not in favor of conducting investigations utilizing undercover tape recording of meetings," Mr. Howerton telephoned Mr. Reid on June 29, 1973, and instructed him to terminate his investigation. On the same day, Mr. Howerton wrote a memorandum to the compliance file memorializing his conversation with Mr. Reid. Mr. Reid did not comply with these instructions until *five months later* when he "forwarded a memorandum dated November 13, 1973 . . . *formally closing that supplemental investigation.*" J.A. 43 (emphasis added). These memoranda appear to be Documents "5" and "3," respectively, to the FTC's Index To Documents, the second and third of the four work product documents which remain at issue.[2]

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[1] This memorandum appears to be Document "6" in the FTC's Index To Documents. That index describes the document as follows:

"Doc. #6

(5) April 4, 1973. Two pages. A Memorandum *from* Kent C. Howerton *to* Alfred W. Cortese, Jr., Assistant Executive Director for Legal Coordination. This document contains an evaluation of the existing investigation of the Americana Corporation and recommendations related to obtaining additional evidence. It was prepared in contemplation of litigation and contains evaluations, recommendations, and opinions of counsel. It is exempt from disclosure as attorney work product." (J.A. 37.)

[2] The FTC's Index to Documents describes Document "5" as follows:

"Doc. #5

(5) June 29, 1973. One page. Memorandum *to* compliance file *from* Kent Howerton, Attorney. This memorandum indicates the contents of discussions in which instructions regarding the investigation of Americana Corporation were

(Footnote continued on following page)

Americana became aware of the existence of these documents and filed discovery requests seeking them. After extensive proceedings and argument, the United States magistrate supervising discovery ordered the FTC to produce numerous documents, including the four documents presently in dispute. The FTC appealed the magistrate's order to Judge Clarkson Fisher, the district judge assigned to the *Americana* case. However, on April 7, 1976, Judge Fisher rejected that appeal and ordered the FTC to turn over the documents to Americana, affirming the magistrate's order in every respect. The FTC refused to disclose the documents, and on November 16, 1976, the district court dismissed the lawsuit with prejudice because of the agency's noncompliance with its discovery order. The FTC appealed neither Judge Fisher's discovery order nor his dismissal order.

On June 20, 1978, Grolier requested documents from the FTC pursuant to the FOIA, including, *inter alia*,

> "All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April

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(Footnote continued from preceding page)

> given by Attorney Howerton. The memorandum indicates Mr. Howerton's thought processes in the preparation of the case and is exempt from disclosure as attorney work product." (J.A. 37.)

The Index to Documents describes Document "3" as follows:

> "Doc. #3
>
> (5) November 13, 1973. One page. Memorandum *from* Wendell A. Reid, Consumer Protection Specialist, New York Regional Office, *to* the Division of Compliance, Bureau of Consumer Protection. This document contains instructions of Attorney Howerton relating to procedures to be used in investigating the practices of the Americana Corporation for trial preparation. It is exempt from disclosure as attorney work product." (J.A. 36.)

The final document which Grolier continues to seek disclosure of is a memorandum to the compliance file, dated April 3, 1973, which, according to the Index To Documents, "records actions taken by attorney Howerton in relation to the investigation of Americana's practices which resulted in the filing of a civil penalty action." J.A. 37.

1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid. . . . " (J.A. 15.)

The Commission, on July 12, 1978, denied Grolier's request in its entirety. J.A. 17-18. However, following Grolier's administrative appeal, dated August 3, 1978, the FTC agreed on October 12, 1978 to release some documents while continuing to withhold others.

On May 3, 1979, Grolier filed this lawsuit seeking disclosure of documents withheld by the FTC. By letters of September 27 and 28 and October 5, 1979, the FTC released additional documents. It then moved to dismiss the complaint, alleging that the remaining documents were exempt from disclosure.

In response to the FTC's motion, Grolier narrowed its request to seven documents. On February 21, 1980, the district court granted the FTC's motion for summary judgment with respect to three of the documents.[3] At that time, the court ordered *in camera* review of the other four documents to determine whether they contained attorney work product prepared "with an eye toward the Americana litigation." *Grolier Inc. v. FTC*, 1980-1 Trade Cas. (CCH) ¶63,188 (D.D.C. 1980). J.A. 50. The four documents viewed by the court, listed as Documents "3," "5," "6" and "7" in the Index To Documents, are the four remaining documents presently before the Court. Following *in camera* review, the district court granted petitioners' motion for summary judgment with respect to these four documents. *Grolier Inc. v. FTC*, 1980-2 Trade Cas. (CCH) ¶63,389 (D.D.C. 1980) (Appendix E to the "Petition For A Writ Of Certiorari To The United States Court Of Appeals For the District Of Columbia Circuit" (Sep. 1982)

[3] In the court of appeals, respondent also sought reversal of the district court's February 21, 1980 grant of summary judgment in favor of the FTC with respect to Documents "1" and "4." The court of appeals determined that Document "4" was exempt from disclosure under Exemption 5 as a privileged attorney-client communication, and that Document "1" was exempt because it was a part of the government's predecisional deliberative process. *Grolier Inc. v FTC*, 671 F.2d 553, 557 (D.C.Cir. 1982); Pet. App. 7a-8a. Respondent has not cross-appealed that determination.

("Pet. App."), p. 21a). The district court found the four disputed documents to be attorney work product exempt from disclosure under Exemption 5. *Id.*, pp. 22a-23a.

Grolier appealed from the grant of summary judgment with respect to six of the seven documents which the district court held were exempt from disclosure. As discussed in footnote 3 above, the court of appeals affirmed the district court's judgment with respect to Documents "1" and "4" and Grolier has not cross-petitioned for reversal of that portion of its decision.

However, a majority of the court of appeals reversed the district court's judgment with respect to Documents "3," "5," "6," and "7," holding that Exemption 5 of the FOIA does not permit the withholding of work product documents where the litigation for which those documents were created has ended and no related or potentially related litigation exists. *Grolier Inc. v. FTC*, 671 F.2d 553, 556 (D.C.Cir. 1982); Pet. App. 7a. The court of appeals then remanded the case to the district court for a determination of whether such related or potentially related litigation exists. The standard set forth by the court of appeals is not meant to apply to civil litigation generally; rather, it is restricted to the context of claims of work product privilege under Exemption 5 of the FOIA. *Id.* Moreover, that standard is not so broad as to permit disclosure merely where the litigation for which the documents were written has terminated; nor does it permit disclosure simply upon a showing that no related litigation is currently pending. *Only* where the litigation for which the work product documents were created *has terminated*, where there exists *no related litigation*, and where there is *no potential for related litigation*, must those documents be disclosed. Judge MacKinnon dissented. He endorsed the "related litigation" standard, but urged that the FOIA suit filed by Grolier itself constituted the requisite related litigation, so that, in his view, the disputed documents would fall within Exemption 5. *Id.* at 558-59; Pet. App. 11a-13a (MacKinnon, J., dissenting).

The court of appeals subsequently denied the FTC's petition for rehearing and its suggestion for rehearing *en banc*. In response to the FTC's petition, the majority filed an additional statement explaining that the its opinion addressed the work product privilege only. Pet. App. 17a-18a. It stated that

it had not addressed the deliberative process privilege, which is also encompassed within Exemption 5, because petitioners never raised that privilege with respect to Documents "3," "5," "6," and "7" in any stage of the proceedings. Neither, for that matter, did petitioners raise any other exemptions which might prevent disclosure where it would be harmful to governmental interests.

Petitioners filed a petition for certiorari on September 2, 1982, and the Court granted that petition on November 8, 1982. This case thus comes before the Court almost a decade after the documents were authored and more than six years after the litigation for which the documents were written was dismissed with prejudice.

SUMMARY OF ARGUMENT

It is important for the Court to keep in mind what this case is *not* about. This case does *not* concern the application of the work product privilege in the context of civil discovery, although much of petitioners' brief addresses that issue ("Brief for Petitioners" ("Pet. Br."), pp. 10-29 (Jan. 1983)); instead, the court of appeals limited its holding to the context of Exemption 5 of the FOIA. Moreover, this case does *not* concern the issue of whether, once a litigation terminates, attorney work product prepared for that litigation must automatically be discoverable, although much of petitioners' brief is also addressed to that issue (*id.*, pp. 14-21). Instead, the court of appeals ruled that disclosure of such work product is necessary *only* when the prior litigation is terminated and no related or potentially related litigation exists. Finally, this case does *not* involve attorney work product of the type discussed in *Hickman v. Taylor*, 329 U.S. 495 (1947), although petitioners contend that it does. Instead, this case involves attorney memoranda detailing unauthorized and unethical investigative techniques which a federal district judge has already ordered disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure. In summary, this case presents no overriding legal

issue that need govern subsequent decisions; it can be decided by the Court on very narrow grounds based on facts which are unlikely to recur in other cases.

Respondent presents four interrelated arguments.

First, it argues that because a federal district court ordered disclosure of the documents in question, those documents are "available by law to a party other than an agency in litigation with an agency" and hence do not fall within the plainly expressed scope of Exemption 5.

Second, the disputed documents reveal an FTC investigation that was conducted in violation of the agency's own internal policies and in derogation of the American Bar Association's ethical rules proscribing an attorney in litigation from contacting the opposing party without informing that party's counsel. Under sound precedent, the very nature of these documents vitiates any work product privilege and removes them from the coverage of Exemption 5.

Third, the standard adopted by the court of appeals—that Exemption 5 is inapplicable to work product documents generated in connection with litigation where such litigation is terminated and no related or potentially related litigation exists—is one which the Court should endorse. That standard best comports with the policies underlying both the FOIA and the work product rule itself. It is a standard which courts in numerous civil discovery cases have applied without any difficulty. It is also a standard which, given the other provisions of the FOIA, protects adequately both the public interest in full disclosure and the government's interest in shielding its attorneys from undue exposure.

Fourth and finally, if the Court rejects the court of appeals' standard as being overly broad, it should modify that standard to fit more precisely the facts of this case and hence establish as limited a precedent as possible. Accordingly, the Court can rule that a work product document prepared for litigation does not fall within Exemption 5 where: (a) it relates to improper, unauthorized or unethical investigatory tactics that have long been abandoned, (b) the litigation and investigation in connection with which that document was authored is terminated, (c) a federal district court has already ordered disclosure of that document in the context of civil discovery, and (d) no related or potentially related litigation exists.

ARGUMENT

I. EXEMPTION 5 IS INAPPLICABLE TO THE DOCUMENTS REQUESTED BY RESPONDENT, REGARDLESS OF WHETHER THE WORK PRODUCT RULE HAS ANY TEMPORAL LIMITATIONS.

A. Introduction.

Petitioners ask the Court to rule, as a matter of civil discovery and as a matter of interpretation under Exemption 5 of the FOIA, that the work product privilege applicable to any particular document applies in perpetuity, even after the litigation for which that document was prepared has terminated and no related or potentially related litigation exists. The Court need not reach out to decide that issue, because this case does *not* involve discovery of work product in civil litigation and because the documents in dispute *do not fall within the specific terms of Exemption 5.* The Court recently confirmed that it sits "to decide concrete cases and not abstract propositions of law" and that it will decline "to lay down a broad rule or series of rules to govern all conceivable future questions in this area [of privilege]" where unnecessary. *Upjohn Co. v. United States,* 449 U.S. 383, 386 (1981). It is unnecessary for the Court to adopt the broad rule advocated by petitioners for two reasons. *First,* the documents in question were "available by law to a party other than an agency in litigation with the agency" and hence do not fall within Exemption 5. *Second,* even assuming *arguendo* that the disputed documents are otherwise protected attorney work product, they reflect serious misconduct by governmental lawyers and any privilege is therefore vitiated.

B. The Clear Language of Exemption 5 Is Inapplicable To These Documents Because They Were Available By Law To A Party In Litigation With An Agency.

The narrow issue presented in this litigation is whether the documents in dispute fall within Exemption 5 of the FOIA (5 U.S.C. §552(b)(5)). That provision states:

"(b) This section does not apply to matters that are—

* * * * *

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

In *United States v. Americana Corp.*, Civ. No. 388-72 (D.N.J.), District Judge Clarkson S. Fisher ordered the FTC to produce to respondent's subsidiary all four of the documents which petitioners now ask the Court to exempt from mandatory disclosure. Regardless of whether the documents were trial preparation materials in the litigation for which they were created, they were *not* unavailable by law in that litigation, and thus, they cannot be exempt from disclosure pursuant to an FOIA request. The exemption states expressly that it is *only* applicable to documents which would not be available by law to a party other than an agency in litigation with an agency. "Reasonably construed, section (b)(5) exempts only documents that a private party in litigation with the agency could not discover." *Swisher v. Department of Air Force*, 495 F.Supp. 337, 339 (W.D.Mo. 1980), *aff'd*, 660 F.2d 369 (8th Cir. 1981). As Justice O'Connor recently wrote in *FBI v. Abramson*, 102 S.Ct. 2054 (1982), this Court "must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation" and it should therefore refrain from construing a statute in a fashion other than the clear language that the statute suggests. *Id.* at 2066 (O'Connor, J., dissenting, joined by Marshall, J.). Quoting Justice Frankfurter, Justice O'Connor stated:

"'A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction . . . [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.'" (*Id.* at 2064, *quoting* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columb.L.Rev. 527, 533, 535 (1947).)

The majority opinion in *Abramson* accepted this principle of statutory construction as controlling whenever the language of a statute is "plain." *Id.* at 2061 n.7. Here, the meaning of Exemption 5 *is* plain; because Judge Fisher ordered the disputed documents to be disclosed in the *Americana* case, those documents do not fall within the exemption.

This argument was made by respondent to, but never reached by, the court of appeals. In its brief to that court, petitioners' only response was that "the fact that documents 3, 5, 6 and 7 may have been found discoverable under the ruling of the District Court in the Americana case is not a dispositive factor [because the] Supreme Court specifically barred this approach in *NLRB v. Sears, Roebuck & Co., supra*, 421 U.S. [132,] at 149 n.16 [1975]." "Brief for Appellees," p. 8 (June 5, 1981). In that cited portion of *Sears*, however, the Court simply noted that:

> "It is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling. Indeed, the House Report says that Exemption 5 was intended to permit disclosure of these inter-agency memoranda, which would 'routinely be disclosed' in private litigation . . .."

Petitioners also cited several cases which quoted, but did not reinterpret, the "routinely disclosable" language used by the Court in *Sears*.[4]

However, *none* of the cases cited by the FTC involved a determination in civil discovery that the very document sought pursuant to a subsequent FOIA request was discoverable. Rather, the "routinely disclosable" gloss upon the terms of Exemption 5 given by the Court was deemed necessary solely in order to avoid *hypothetical* claims that, in a certain type of proceeding, a disputed document *might* be discoverable. If such hypothesizing were allowed, Exemption 5 would be

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[4] The cases cited in support of petitioners' argument were: *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 353 (1979), *Jordan v. United States Department of Justice*, 591 F.2d 772 (D.C.Cir. 1978) and *Exxon Corp. v. FTC*, 663 F.2d 120 (D.C.Cir. 1980).

meaningless, since *some* litigation "in which the private party's claim is the most compelling" would always be imaginable. Petitioners themselves acknowledge this reading of *Sears* in their brief. Pet. Br., p. 37. The vital distinction here, however, is that there is an actual, not a hypothetical, court order that judicially resolves the issue of discoverability in respondent's favor. The broad policy of disclosure inherent in the FOIA should thus compel disclosure of documents in the narrow circumstances presented in this case where a district court has already ruled that those documents are available as a matter of law to a private party in litigation with an agency.

C. Exemption 5 Is Inapplicable To These Documents Because They Would Be Routinely Available In Civil Discovery.

A second independent reason why Documents "3," "5," "6," and "7" are not exempt from disclosure pursuant to Exemption 5, regardless of whether the work product rule has any temporal limitations, is that such documents, which describe an unauthorized and unethical covert investigation, would be routinely available in civil discovery. Petitioners attempt to characterize these documents as trial preparation materials, the disclosure of which would reveal the thought processes and opinions of an attorney preparing a case brought by the FTC. Assuming *arguendo* the accuracy of this characterization, the documents differ from other "trial preparation" materials in one crucial respect: all four documents involve Mr. Howerton's recommendations and actions regarding the conduct of a covert investigation following the filing of a civil penalty action. Indeed, this investigation was not terminated until five months after the FTC had issued a general policy statement disapproving of the types of investigatory tactics engaged in by Wendell Reid at the behest of Mr. Howerton. Given the nature of those materials, a party in litigation with the agency would *always* be able to demonstrate the type of need which is necessary for the disclosure of such documents.

The documents would thus be "routinely disclosable," and hence are not encompassed within Exemption 5.[5]

Where the government conducts a clandestine investigation of the type involved in this case, it commits a clear violation of the ethical requirements of the Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility, which states that:

> "During the course of his representation of a client a lawyer shall not:
>
> > (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Here, the government violated this rule when Mr. Howerton directed the FTC's New York Regional Office on April 4, 1973 to enroll an attorney or Consumer Protection Specialist "in the sales personnel training course at one of [Americana's] sales offices without identifying himself or herself as an employee of the Commission to obtain evidence concerning the sales training materials and instructions then being given to [Americana's] sales trainees." J.A. 42-43. The FTC thus sought to obtain evidence to bolster a complaint against Americana which had been filed over a year earlier without identifying its investigator as such, and without obtaining the consent of Americana's counsel.

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[5] In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), this Court stated that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." The Court further noted that "the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation, H.R.Rep.No. 1497, p. 10, and we accept this as the law." 421 U.S. at 149 n.16. Thus, if the character of the documents is such that, even though they are arguably trial preparation materials they would be routinely available in civil discovery, then they must be disclosed in response to an FOIA request.

Given this conduct, Americana contended that disclosure of the documents relating to instructions given to the FTC's investigator was mandated. This contention was set forth in the "Defendant's Memorandum in Opposition to Plaintiff's Appeal of the Magistrate's Discovery Order" (Jan. 23, 1976) in the *Americana* case:

> "On or about April 24, 1973 and while Mr. Reid was a Consumer Protection Specialist with the F.T.C., he filed a surreptitious application for employment with one of the Grolier group of companies. At this time he was interviewed by John Ezzo, a salesman charged with an improper sale in the Amended Complaint. Mr. Reid obtained certain documents from Mr. Ezzo under that subterfuge in April of 1973, some fourteen months after the commencement of the present lawsuit and without any notice to Americana Corporation or its attorneys of record. These documents are presently embodied in the contents of plaintiff's proposed trial exhibit No. 21.
>
> "Despite the fact that the present lawsuit had been instituted, a responsive pleading filed and extensive discovery was in progress, a covert interview of this sort was conducted at the behest of plaintiff. Certainly there is some question of propriety and ethics involved in this course of action, and the obvious public policy against this sort of conduct by our Government should be enforced.
>
> "Therefore, [Magistrate] Devine exercised judicial discretion and good conscience when he ordered plaintiff to produce the documents referred to in these Interrogatories. Indeed, no lesser result was mandated under these circumstances. Accordingly, defendant respectfully urges this Court to uphold that decision." (*Id.*, pp. 9-10.)

Judge Fisher agreed and affirmed the magistrate's discovery order on April 7, 1976, stating:

> "Defendants are also entitled to documents relating to the activities of Wendell A. Reid, an agent sent to work for defendant, to obtain information for the plaintiff after this suit was instituted, an answer filed, and extensive discovery in progress. Accordingly, the magistrate's discovery order was appropriate under the circumstances." ("Memorandum," p. 7 (Apr. 7, 1976).)

Respondent respectfully submits that given the nature of the documents in dispute, discovery of such documents would be routinely granted, notwithstanding the fact that they may contain attorney work product.

The district court of New Jersey is not the only court which has reached this conclusion. In *Moody v. IRS*, 654 F.2d 795 (D.C.Cir. 1981), the court of appeals remanded the case to the district court to determine whether a document claimed to be protected attorney work product must be disclosed pursuant to the FOIA because the lawyer's conduct in violation of the rules of professional responsibility vitiated the privilege. In that case, the document which plaintiff sought detailed a meeting held between an IRS lawyer and a federal district judge from which plaintiff's attorney was excluded. The court of appeals stated:

> "Appellant contends, however, that the work product doctrine does not cover Document 19 because it is the fruit of impermissible legal conduct. According to appellant, the purposeful exclusion of opposing counsel from the meeting violated the court's rules and the American Bar Association's ethical standards. Moody argues that it would be a perversion of the work product doctrine designed 'to encourage effective legal representation *within the framework of the adversary* system,' to allow it to be used to 'cover up' activities destructive of that system.
>
> "We agree that, at least in some circumstances, a lawyer's unprofessional behavior may vitiate the work product privilege. we therefore remand this case to the district court so that it may determine in the first instance whether such circumstances exist in this case, and more fundamentally, whether the actions of the IRS attorney in fact violated professional standards.
>
> * * * * *
>
> "It would indeed be perverse, as appellant contends, to allow a lawyer to claim an evidentiary privilege to prevent disclosure of work product generated by those very activities the privilege was meant to prevent. Non-disclosure would then provide an incentive for, rather than against, the disfavored practices. The integrity of the adversary process is not furthered by protecting a lawyer

> who steps outside his role as 'an officer of the court . . . work[ing] for the advancement of justice while faithfully protecting the rightful interests of his clients.' An attorney should not be able to exploit the privilege for ends outside of and antithetical to the adversary system any more than a client who attempts to use the privilege to advance criminal or fraudulent ends." (*Id.* at 799-800; footnotes omitted.)

While the court in *Moody* noted that the disclosure of documents is not the only remedy for such a breach of ethics, if the violation resulted from the "exclusion of the opposing party and his counsel from a meeting[,] disclosure of what went on at that meeting . . . would therefore seem an appropriate remedy." *Id.* at 801 n. 23.[6]

Other lower courts have reached similar conclusions in FOIA cases involving bases for a claimed exemption other than the work product privilege. For instance, in *Tax Reform Research Group v. IRS*, 419 F.Supp. 415 (D.D.C. 1976), a claim under Exemption 5 based on the deliberative process privilege was denied with respect to agency memoranda detailing attempts by the IRS to harass opponents of the Nixon administration. The court found such documents not a part of the "legitimate governmental process," and hence not within the coverage of Exemption 5. Similarly, in *Kanter v. IRS*, 433 F.Supp. 812 (N.D.Ill. 1977), the court ordered disclosure of documents revealing unauthorized investigatory tactics by the agency, holding that such documents could never fall within Exemption 7 of the FOIA (5 U.S.C. §552(b)(7)). It reasoned that the FOIA did not shield materials relating to such unauthorized investigations. 433 F.Supp. at 822-23.

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[6] On remand, the district court in *Moody* declined to order disclosure, finding no ethical violation. *Moody v. IRS*, 527 F.Supp. 535, 537 D.D.C. 1981). The court of appeals reversed this determination on the ground, *inter alia*, that the unsworn statements of the attorney in question were insufficient to foreclose any determination of misconduct; it reaffirmed its view that actions in derogation of an attorney's ethical responsibilities would serve to vitiate the work product privilege. *Moody v. IRS*, 682 F.2d 266, 268 (D.C.Cir. 1982). *Accord, Martin v. Lauer*, 686 F.2d 24, 32 & n.37 (D.C.Cir. 1982).

In this case, the misconduct at issue resulted from the failure of the FTC's attorney to inform his adversary of the supplemental investigation by Mr. Reid, and to seek consent for interviews of the employees of the adversary's clients, and from that lawyer's failure to curtail an investigation clearly in violation of the agency's policies for a period of five months. Under the logic of *Moody* and *Kanter*, this factor is sufficient to vitiate the privilege being claimed by the government. The appropriate remedy in such a situation is disclosure of the memoranda written about the agency's covert investigation. Thus, given the type of documents involved in this case, disclosure in civil discovery would result as a matter of course. The documents would therefore be "routinely disclosable" and, as the Court reasoned in *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975), not exempt from mandatory disclosure under the FOIA.

II. NO HARM TO THE ADVERSARY PROCESS WILL RESULT FROM THE DISCLOSURE OF THESE DOCUMENTS.

A. The Test For Disclosure Adopted By The Court of Appeals Is Confined To The Context Of An FOIA Request.

Even if the Court were to conclude that the disputed documents would otherwise fall within Exemption 5, it should nonetheless order disclosure of these documents because the court of appeals promulgated the appropriate standard for construing that provision of the FOIA. The bulk of petitioners' brief is directed at demonstrating that harm to the government might result from the disclosure of documents in the context of civil discovery even after the litigation for which the documents were written has terminated.[7] However, the legal standard adopted by the court of appeals is restricted to determining

[7] At page 29 of their brief, petitioners acknowledge that they "have thus far addressed the application of the court of appeals' test in the civil discovery context." Pet. Br., p. 29.

whether the documents are exempt from disclosure pursuant to Exemption 5, and has no applicability to civil discovery. 671 F.2d at 556; Pet. App. 6a-7a. The court of appeals offered two reasons for so restricting its holding. *First*, unlike the case with civil discovery, when considering an FOIA request "the presumption in favor of disclosure is at its zenith." *Id.*[8] *Second*, in the context of civil discovery, the privilege is qualified and may be overcome by demonstrating need. Indeed, as the court of appeals noted, if the work product privilege were an impenetrable protection against civil discovery, the courts which extended that privilege to include documents generated in a prior terminated litigation might not have done so. *Id.* at 556 n.6, Pet. App. 5a n.6, *quoting United States v. Legget & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).[9]

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[8] The Court has on numerous occasions emphasized the policy of broad disclosure embodied in the FOIA. *See, e.g., FBI v. Abramson*, 102 S.Ct. 2054, 2059 (1982) ("[t]he Freedom Of Information Act set forth a policy of broad disclosure of government documents in order 'to ensure an informed citizenry, vital to the functioning of a democratic society.'"); *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 351 (1979) ("the purpose of the FOIA is 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' S.Rep.No. 813, 89th Cong., 1st Sess., 3 (1965)"); *EPA v. Mink*, 410 U.S. 73, 80 (1973) ("[w]ithout question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"); *Accord, NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

[9] All three circuits which have rejected the "related litigation" test were cognizant that the documents remained discoverable upon a sufficient showing of need, and all three courts indicated that they would have been less likely to apply the work product doctrine in subsequent unrelated litigation if it were an impenetrable protection against discovery. *See In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977) ("Our conclusion that the work product privilege extends to documents prepared in previous, unrelated litigation will not make

(Footnote continued on following page)

The *ad hoc* balancing process which exists when applying the work product rule in civil discovery does not occur here because the need of an individual litigant is not to be considered under a public disclosure statute such as the FOIA. Rather, that balancing process has been replaced in Exemption 5 by narrow categorical exceptions from the work product privilege, designed to require disclosure where the government's interest in secrecy is weakest or the public interest in disclosure is strongest. For that reason, the court of appeals' "related litigation" test is the optimal method of construing the FOIA.

1. In civil discovery the work product rule is a balancing standard, weighing the need for discovery against any detriment arising from disclosure.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Court first announced the work product rule. However, it recognized expressly that the immunity from discovery is not absolute and may be overcome by a sufficient showing of a litigant's need for disclosure. The Court explained:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in

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attorney's files impregnable. As to ordinary work product, a litigant can secure access to these documents by establishing the relevance of the requested documents . . . and by satisfying the substantial need and undue hardship requirements. . . . "); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) ("Were the work product rule an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery. . . . "); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 485 (4th Cir. 1973) ("Our decision will not in any way frustrate the ends of justice. If the party seeking discovery can demonstrate the substantial need and undue hardship specified in the Rule . . . the district court will order production.").

all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clue as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." (*Id.* at 511-12.)

In 1970, Congress revised the Federal Rules of Civil Procedure to incorporate the work product rule set forth in *Hickman*. Federal Rule of Civil Procedure Rule 26(b)(3) sets forth the following standard for allowing discovery of trial preparation materials:

"(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impres-

sions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

In effect, the rule adopts a balancing standard. Due to the importance to the adversary process of an attorney being able to prepare his or her case, trial preparation materials are immune from discovery, absent a showing of substantial need and inability without undue hardship to obtain equivalent materials by other means. Where, such a showing is made, the documents are discoverable. However, where disclosure of the material will reveal mental impressions and legal theories of an attorney, the court should take further steps to protect such materials or require even a higher degree of need to obtain disclosure.

2. The FOIA's narrow categories of exemption contrasted with civil discovery.

In *EPA v. Mink*, 410 U.S. 73 (1973), the Court explained that the FOIA is a revision of Section 3 of the Administrative Procedure Act (5 U.S.C former §1002), which was designed to replace "vague phrases, such as that exempting from disclosure 'any function of the United States requiring secrecy in the public interest,'" with "nine exemptions from compelled disclosures . . . intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." 410 U.S. at 79. The Court futher stated that the exemptions contained in subsection (b) of the FOIA were designed to perform, on a categorical basis, the balancing of the public's need for disclosure against the government's need for secrecy:

> "Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not 'an easy task to balance the opposing interests, but it is not an impossible one either . . .. Success lies in providing a workable formula which encompasses, balances and protects all interests, yet places emphasis on the fullest responsible disclosure.' S.Rep.No. 813, p. 3." (410 U.S. at 80.)

The Court in *Mink* recognized that "the discovery rules can only be applied under Exemption 5 by way of rough analogies." *Id.* at 86. The Court has also indicated that Exemption 5 was not intended to incorporate "every privilege known to civil discovery." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 354 (1979). In that case, the Court explained that in the context of civil discovery, a qualified privilege exists for trade secrets and other confidential commercial information, under which "the courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim for privacy against the need for disclosure." *Id.* at 362. Despite the fact that one does not consider the requester's special need for disclosure under the FOIA (*see EPA v. Mink, supra*, 410 U.S. at 86), the Court held in *Merrill* that the qualified nature of the privilege required that it not be applied in every case where a trade secret claim might be upheld in civil discovery. Rather, only where the government would be significantly harmed by disclosure could it delay disclosure pursuant to Exemption 5. *Id.* at 362-63.

With respect to the work product rule under Exemption 5, the Court has likewise applied the rule to prevent disclosure only where a significant harm to governmental interests would be prevented thereby. Where, on the other hand, no such harm would occur to the government, or where the public interest in disclosure is especially great, Congress and the courts have carved out exceptions to the work product rule's application under Exemption 5 of the FOIA that are not applied in civil discovery.

The most prominent exception from the work product rule, as incorporated by Exemption 5, is that factual material must be disclosed, despite the fact that it receives a qualified protection from civil discovery under Fed.R.Civ.P. 26(b)(3). In *EPA v. Mink, supra*, 410 U.S. at 89, the Court stated that "[v]irtually all of the courts that have thus far applied exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." As one district court has phrased it, "the portion of the attorney work product rule subsumed into Exemption 5 is

that portion which protects from discovery mental impressions, conclusions or legal theories of a Government attorney, the deliberations of counsel but not factual and tangible matter." Fonda v. CIA, 434 F.Supp. 498, 505 (D.D.C. 1977). *See* Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 Geo.Wash.L.Rev. 843, 862 (1981) (civil discovery privileges broader than analogous privileges incorporated in FOIA's exemptions).

The differing treatment of factual attorney work product material is not the only distinction between the work product privilege under Rule 26(b) and Exemption 5. Other courts have held that attorney work product documents lose the protection afforded by Exemption 5 when the documents are incorporated by reference in a final agency opinion; yet no such analogous principle exists in the context of civil discovery. *See Bristol-Myers Co. v. FTC*, 598 F.2d 18, 29 (D.C.Cir. 1978).

Consequently, where the governmental interest in secrecy is negligible, the Court should carve out a limited exception to that portion of the work product rule encompassed within Exemption 5, even if it would not be willing to carve out such an exception in the context of civil discovery.

B. The "Related Litigation" Test Best Balances The Competing Policies Of The FOIA And The Work Product Rule.

1. Once litigation has ended and no prospect for related litigation exists, the policies underlying the work product rule no longer apply.

a. The policy underlying the work product doctrine as expressed in Rule 26 and this Court's decisions.

The heightened standard of need required for disclosure of documents by the work product rule, which is embodied in Rule 26(b)(3), applies to trial preparation materials prepared in anticipation of litigation. Congress sought to prevent harm to the trial process, which might result from an attorney's knowledge that his or her written work product in preparation

for litigation could be discovered freely by an adversary and used against the attorney in that litigation. As the Advisory Committee's Note to the 1970 Amendments to Rule 26(b)(3) states:

> "[T]he requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, *and that one side should not automatically have the benefit of the detailed preparatory work of the other side.*" (Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 501 (1970); emphasis added.)

The concern about damage to the adversary process stemming from an attorney's knowledge that his trial preparation materials might be prematurely disclosed to his opponent has been repeated on numerous occasions by the Court. In the seminal opinion of *Hickman v. Taylor*, 329 U.S. 495 (1947), both the opinion of the Court and Justice Jackson's concurring opinion emphasized the work product rule's purpose of preventing harm to the adversary process. The Court stated that the rule is necessary for the "[p]roper preparation of a client's case," *(id.* at 511) and to advance *"the public policy underlying the orderly prosecution and defense of legal claims" (id.* at 510; emphasis added). As a result, only documents prepared "with an eye toward litigation" are subject to protection under the work product rule.[10]

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[10] As the district court in *Gulf Construction Co. v. St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D.Tex. 1959) observed: "Hickman v. Taylor involved the discovery and production of statements of witnesses acquired by counsel in anticipation of the litigation then before the court." However, where the requested documents were not prepared in anticipation of the case at bar, but rather concerned a claim which could constitute a separate lawsuit, the documents do "not constitute the work product of the lawyer, produced in preparation of a client's case and so intimately concerned with the functioning of the lawyer that their production would have a demoralizing effect on the legal profession." *Id.*

Similarly, Justice Jackson, in his concurring opinion, observed that the harm sought to be curtailed by the work product doctrine is the destruction of the adversary process which would occur from the disclosure of the attorney's trial preparation materials in advance of trial: "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).[11] This emphasis on harm to the adversary process through premature disclosure as the basis for any work product privilege was reaffirmed by the Court in *United States v. Nobles*, 422 U.S. 225, 236 (1975) and *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981), both of which reiterate the language of *Hickman*.[12]

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[11] The lower courts are divided on the issue of whether documents revealing mental impressions and trial strategies are absolutely immune from discovery in the case for which they were written, or may be disclosed upon a compelling showing of need by the party seeking discovery. *Compare In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Natta*, 410 F.2d 187, 192-93 (3d Cir.), *cert. denied*, 396 U.S. 836 (1969); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 90 F.R.D. 45, 47 (N.D.Ill. 1981); *In re Special September 1978 Grand Jury II*, 640 F.2d 49, 63 (7th Cir. 1980) (holding that such documents receive only a qualified immunity and may be overcome by a sufficient showing of need) *with Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733-35 (4th Cir.), *cert. denied*, 420 U.S. 997 (1975) (holding that such documents may never be disclosed). The Court has declined to reach the issue, indicating that whether or not such documents are absolutely immune, they are, at a minimum, subject to special protection and may not be disclosed merely under the "substantial need" and "undue hardship" standard. *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981).

[12] Petitioners mislead the Court when they state that the *Sears* decision supports implicitly the view that the work product privilege is perpetual in nature. Pet. Br., p. 15 n.6. Petitioners assert that many of the documents sought by Sears related to closed files, but that the Court drew no distinction therefrom in applying the privilege. In fact, however, the General Counsel of the NLRB told Sears that he would "make available . . . all Advice and Appeals Memoranda in cases which had been closed—either because litigation before the Board had been completed or because a decision not to file a complaint had

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Accordingly, as the court of appeals recognized:

"The purpose of the privilege, as this court has made clear, 'is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself * * *.' *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C.Cir. 1978) *(en banc)* (emphasis in original; footnote omitted). Therefore, in order to fall within the scope of the privilege a document '*must* " relate to the conduct of either ongoing or prospective trials; [it must] include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any ongoing or prospective trial." ' *Exxon Corp. v. FTC*, 663 F.2d 120, 129 (D.C.Cir. 1980) (emphasis added; brackets in original) *(quoting Jordan v. U.S. Dep't of Justice, supra*, 591 F.2d at 775-776)." *(Grolier Inc. v. FTC, supra*, 671 F.2d at 556; Pet. App. 6a.)[13]

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become final." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 145 (1975). In ruling on Exemption 5 claims, the Court ordered disclosure of all Advice and Appeals Memoranda recommending dismissal of a charge, but held that such memoranda that direct the filing of a complaint are protected by the work product privilege. *Id.* at 158-60. Yet if petitioners are right here, then the Court in *Sears* should have held that to the extent memoranda recommending dismissals contain attorney work product, they are exempt forever pursuant to Exemption 5; that the Court did not do so means that *Sears* supports implicitly the position of the court of appeals below, not that of petitioners.

[13] Petitioners argue that the language from *Jordan* contained in this quotation was taken out of context and merely "meant that a document cannot be work product unless, when made or compiled, it related to 'ongoing or prospective trials.' " Pet. Br., pp. 34-35 n.12. In fact, however, the language is, at most, ambiguous; the court in *Jordan* may have meant that the documents were not protected because they were not initially prepared in anticipation of specific litigation, or because at the time of the FOIA request in that case, no ongoing or prospective litigation existed. Given the principle that privileges from discovery should be narrowly construed, so as not to obstruct the search for the truth, and the fact that exact language used

Thus, the fundamental concern underlying the work product privilege is with the trial process itself. Harm to the adversary system must be measured against the need of a litigant for disclosure of documents.

In this case, however, as the court of appeals noted, once the litigation for which the documents were written has been completed, and no related or potentially related litigation exists, the possiblity of damage to the adversary system is foreclosed because the purpose of the work product doctrine has already been achieved. *Grolier Inc. v. FTC, supra*, 671 F.2d at 556, Pet. App. 7a, *quoting In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D.Fla. 1977).

Once litigation has terminated, an attorney need not fear that his opponent will gain an unfair advantage by discovering his strategies and trial preparation materials. Furthermore, the vague possibility of future disclosure would not discourage adequate preparation because the immediate need to prepare for trial would greatly outweigh any disadvantage to be incurred through eventual disclosure.

b. The policy underlying the work product rule does not support petitioners' proposed test.

In the prior subsection, respondent has shown that the courts and the drafters of the Federal Rules all state the view that the work product privilege applies to anticipated or ongoing litigation. This point is also supported by a consideration of the policies underlying that privilege which have been identified by commentators.

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by the court in *Jordan* that "public disclosure . . . could have no conceivable effect on the actual conduct of an on-going or prospective trial" (591 F.2d at 775), the court of appeals here was certainly reasonable in citing this language as support for its "related litigation" standard and is in the best position to construe the meaning of its own prior decision.

One noted scholar, Professor Edward Cooper,[14] has explained that one "justification for the work-product protection which might be found within the terms suggested by the Court is that it is somehow unfair for one party to reap the harvest of preparatory seeds sown by his opponent. Such a notion might be based upon an aversion to allowing the lazy and slothful to profit from the diligence of others, or in a vested-rights idea that 'a lawyer is entitled to the fruits of his labor.'" Cooper, *Work Product of the Rulemakers*, 53 Minn.L.Rev. 1269, 1276 (1969).[15] It is clear that this justification has no application under the "related litigation" test because after the prior case is over and there is no prospect of related or potentially related litigation, it is too late for the lazy or unprepared attorney to profit from his opponent's work.

Professor Cooper noted further that, while it is unclear what the Court in *Hickman* meant by its "vague allusion to 'sharp practices'" by attorneys which might develop from unlimited discovery, commentators have suggested "that lawyers would simply lie about information uncovered by their own investigations, insert false statements or misleading memoranda in their files, or that their ingenuity might in some other way 'prove equal to the situation.'" *Id.* at 1278. While it is doubtful that, even if unlimited discovery existed, lawyers would resort to such practices, it is inconceivable that a lawyer would bother making such efforts if he or she knew that disclosure could only result when the litigation is over and no related or potentially related litigation exists.

As for the argument that disclosure would deter adequate investigation or preparation of written materials adverse to

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[14] The court of appeals cited Professor Cooper's commentary as direct support for the "related litigation" test. 671 F.2d at 555; Pet. App. 5a. Petitioners' assertion that his conclusion appears in a footnote and is "without any supporting analysis" (Pet. Br., p. 32 n.11) ignores Professor Cooper's lengthy analysis of the purpose of the work product protections.

[15] The same justifications for the work product rule discussed in Professor Cooper's commentary have been advanced by other commentators. *See, e.g.*, Note, *Discovery of An Attorney's Work Product In Subsequent Litigation*, 1974 Duke L.J. 799, 820.

one's client, Professor Cooper observed that the need for written records will outweigh a lawyer's fear of eventual disclosure. *Id.* at 1277-81.[16] This should hold particularly true for government attorneys. As petitioners note ("Petition for Certiorari," p. 13 (Sept. 1982)), the very size of the government and the transience of the attorneys employed by it dictate the need for comprehensive written files. Yet, precisely because of all of these pressures, it is far more likely that government attorneys will continue to put their preparation materials in writing rather than be deterred from doing so by the slight risk that their written materials may eventually be made public at a time when it would no longer be beneficial to their adversaries.

c. Rebuttal to petitioners' counterarguments.

Realizing the weaknesses inherent in their policy arguments when applied to the test adopted by the court of appeals, petitioners set up several "straw man" arguments. Each such argmuent was rejected by the court of appeals and requires little discussion.

First, petitioners contend that all of the courts of appeals which have reached the question of whether the work product privilege extends to subsequent litigation in the civil discovery context have answered it in the affirmative. Pet. Br., p. 7. As discussed previously, however, significant differences exist between considerations in the context of civil discovery and those

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[16] Professor Cooper stated:

> "There is good reason to doubt whether in fact many lawyers would dare to curtail trial preparation activities for the reasons thus suggested. . . . Professor James has answered this explanation with the three-barreled response that: 'no party can afford to forego the kind of preparation he believes is needed'; each party 'must know the facts as they are likely to appear at trial,' and be able to evaluate the case realistically for settlement purposes; and no party 'will be willing to let his adversary get to the witnesses first if this can be helped.'" Cooper, *supra*, 53 Minn.L.Rev. at 1280, *quoting* F. James, *Civil Procedure* 206 (1965).)

See also LaFrance, *Work-Product Discovery: A Critique*, 68 Dick.L. Rev. 351, 367-68 (1964).

under the FOIA. In civil discovery, a court always performs a balancing task and may order disclosure even if the documents fall within the work product privilege. Indeed, as indicated in footnote 9 above, all three circuits which have reached this question explicitly stated that, were the work product rule an "unpenetrable protection against discovery," they would have been less inclined to extend the privilege to subsequent unrelated litigation. The court of appeals in this case also noted that this is a basis for distinguishing Exemption 5 from Rule 26(b)(3). 671 F.2d at 556 & n.6; Pet. App. 4a-5a & n.6. The FOIA, on the other hand, replaces the case-by-case balancing standard existing in civil discovery with categorical exceptions from the privilege designed to perform this balancing task on a more general basis.

Petitioners further attempt to create an impression that there are no cases which support a "related litigation" standard, or that those cases which do support the standard are poorly reasoned and rely uncritically on past decisions. These assertions are simply false.

In *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967), the Second Circuit distinguished two lower court opinions which held that the work product privilege is applicable only in the litigation for which the work was prepared. The court of appeals reasoned that in those cases, the "prior proceedings had been fully completed before discovery was requested," whereas in *Republic*, the attorney's former clients remained suable. As a result, the purpose of the work product rule—to remove the fear that the attorney's thoughts would be invaded by his adversary and used against him—would be defeated. This method of distinguishing the prior cases supports implicitly the principle that, when the litigation is over and there is no related or potentially related litigation, the privilege does not apply. Indeed, cases which have relied on *Republic* have cited it explicitly for this proposition. *See, e.g., Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 153 (D.Del. 1977); *Commonwealth Of Puerto Rico v. S.S. Zoe Colocotroni*, 61 F.R.D. 653, 658 (D.P.R. 1974); *Midland Investment Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50

F.R.D. 117, 119 (M.D.Pa. 1970); *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 275 F.Supp. 146, 148 (E.D.Pa. 1967); *A. v. District Court of Second Judicial District*, 550 P.2d 315, 328 (Colo. 1976); *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 716 (Del.Ch. 1976).[17]

Furthermore, as noted by the court of appeals (671 F.2d at 555; Pet. App. 4a), many of the legal commentators who have considered the issue have supported an existing or potential related litigation standard similar to that adopted by it. For example:

> "Ordinarily the work-product privilege will have served its purpose when the particular litigation for which material was gathered has terminated, either by the entry of judgment or by the running of the statute of limitations. But so long as a likelihood of litigation remains, it seems that the protection should continue, even if it is afforded to one not a party to the suit in which discovery is sought." (Note, *Developments In The Law—Discovery*, 74 Harv.L.Rev. 940, 1038 (1961); footnotes omitted.)

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[17] There are also numerous cases which would go even further and confine the work product privilege to the litigation for which the documents were created, regardless of whether any related or potentially related litigation exists. *See, e.g., Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 402 (E.D.Va. 1975); *United States v. IBM Corp.*, 71 F.R.D. 376, 379 (S.D.N.Y. 1976); *United States v. IBM Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F.Supp. 407, 410 (M.D.Pa. 1962); *Gulf Construction Co. v. St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D.Tex. 1959); *Tobacco & Allied Stocks v. Transamerica Corp.*, 16 F.R.D. 534, 537 (D.Del. 1954).

In an analogous setting, it should further be noted that the courts have refused to find appraisers' reports privileged from discovery under the FOIA where the transaction to which those reports related has been completed. *E.g., Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (6th Cir. 1972), *aff'g* 341 F.Supp. 1013, 1015 (M.D.Tenn. 1971); *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Philadelphia Newspapers, Inc. v. HUD*, 343 F.Supp. 1176, 1178 (E.D.Pa. 1972).

Similarly, Professor Cooper observed:

> "Several cases suggest that the protection applies only if the materials were prepared in anticipation of the very suit before the court . . . and vanishes when that litigation is terminated. . . . It should be clear that this conclusion is tenable only when there is no danger of disclosure to others pursuing claims related to the claims involved in the litigation giving rise to the one-time work product materials." (Cooper, *supra*, 59 Minn.L.Rev. at 1299 n.100.)

Petitioners contend that "the policy underlying the work-product doctrine would be seriously eroded if the privilege immediately evaporated upon the termination of the litigation in connection with which it was prepared." Pet. Br., p. 18. That test, however, is not the one adopted by the court of appeals. Moreover, petitioners' hypothetical example of a complaint which "had been dismissed on grounds that did not bar reinstitution of suit" (*id.*, p. 19) is fundamentally different from the facts of this case, where the *Americana* civil penalty action was dismissed with prejudice. Petitioners' assertion that attorneys will fail to prepare written materials because of a remote possibility of disclosure in subsequent related litigation (Pet. Br., pp. 18-19), again ignores the fact that the standard adopted by the court of appeals precludes such disclosure.[18]

Petitioners then proffer their second "straw man," arguing that the "related litigation" standard will not solve the foregoing problems because of the uncertainties in defining related litigation. Pet. Br., pp. 21-24. Yet, uncertainty as to whether a document will be protected by the work product privilege is inherent in the privilege itself, since whether a document is protected in the context of civil discovery is determined by a balancing process. Whether the litigation in which disclosure is sought is related to the litigation for which the documents were

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[18] Indeed, contrary to petitioners' representations, all three of the judges on the court of appeals adopted a related litigation test. Judge MacKinnon simply thought that an FOIA suit by one who had been a party to the previous litigation constituted the requisite related litigation. 671 F.2d at 558-59; Pet. App. 11a-13a (MacKinnon, J., dissenting).

created, and how closely related are those two cases, are simply additional factors to be considered in determining whether documents should be disclosed. Moreover, the "related litigation" standard has been applied by numerous cases in the work product context with little difficulty, and has been embodied in other statutes adopted by Congress. *See infra*, at pp. 33-35.

Finally, petitioners list a series of harms which conceivably could occur, no matter what context the disclosure occurred. Pet. Br., pp. 18-20, 24-25. It should be noted that since the court of appeals confined its ruling to the FOIA, the only context in which such harms should be considered is that of disclosure pursuant to the FOIA. However, even if the test adopted by the court of appeals were applied in the civil discovery context, a party would not be able to burden his adversary with irrelevant, vexatious and expensive discovery requests. As the Court explained in *Herbert v. Lando*, 441 U.S. 153 (1979):

> "[T]he discovery provisions, like all of the Federal Rules of Civil Procedure are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.' (Emphasis added.) To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .' Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process." (441 U.S. at 177.)

Thus, in the context of civil discovery, the Federal Rules protect against the prospect of burdensome document requests from prior cases, or from disclosure of documents which might embarass the attorney in front of his former client.

While the FOIA has no requirement that the documents be relevant (since every member of the public has an equal right of access to government documents), other protections from requests which are oppressive, expensive, or otherwise harm

government interests have been specifically enumerated in the Act and its exemptions. *First*, unduly burdensome requests will be discouraged by the provisions allowing the agency to charge reasonable search and copying costs. 5 U.S.C. §552(a)(4)(A). *Second*, other exemptions exist under the FOIA to prevent disclosure where it would be harmful. *See infra*, at p. 35.[19]

2. The test adopted by the court of appeals is workable and will give adequate protection to government attorneys.

a. The test is workable.

Petitioners contend that the "related litigation" standard adopted by the court of appeals is nebulous and inherently

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[19] Another factor weighing in favor of disclosure here is that the documents in question relate to investigative techniques that have long since been abandoned. 671 F.2d at 557; Pet. App. 7a. Yet in the context of civil or criminal discovery, courts have often permitted disclosure of documents relating to terminated governmental investigations because of the very remoteness in time of such documents. *See Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969); *Wood v. Brier*, 54 F.R.D. 7, 11-12 (E.D.Wis. 1972); *Capitol Vending Co. v. Baker*, 35 F.R.D. 510, 511 (D.D.C. 1964). Similarly, in 1974, Congress amended Exemption 7(A) of the FOIA so that investigatory records cannot be withheld after the investigation and enforcement proceedings had concluded. *See* H.R.Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974); 120 Cong.Rec. 17033-34 (May 30, 1974). The Court itself acknowledged the intent of Congress in so amending Exemption 7 in *NLRB v. Robbins Tire & Rubber Corp.*, 437 U.S. 214, 227-32 (1978), and since *Robbins*, courts have repeatedly held that where investigation and enforcement proceedings have been completed, a document relating thereto is not protected under Exemption 7(A). *E.g., Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1184 (5th Cir. 1978); *Nemacolin Mines Co. v. NLRB*, 467 F.Supp. 521, 524 (W.D.Pa. 1979); *Associated Dry Goods Corp. v. NLRB*, 455 F.Supp. 802, 812-13 (S.D.N.Y. 1978). By citing Exemption 5 as the basis for withholding the documents involved in this case concerning Mr. Howerton's instructions on conducting an investigation, petitioners attempt to avoid having to prove that disclosure will either "interfere with enforcement proceedings" (5 U.S.C. 552(b)(7)(A)), or "disclose investigative techniques and procedures." (5 U.S.C. 552(b)(7)(E). This is clearly contrary to the express intent of Congress in amending Exemption 7.

unworkable. That assertion is nonsense. The cases that have utilized the test in the context of civil discovery have had little difficulty in applying it. Those cases have looked to a variety of factors in determining whether two cases are related, including: (1) whether the same parties are aligned in the same way in the two cases; (2) whether the same counsel represented the parties in the two cases; (3) whether the two cases were of the same nature, *i.e.*, both criminal or both civil; and (4) whether the issues being contested in the first case were identical or substantially the same as the issues being contested in the second case. *See, e.g., Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 153 (D.Del. 1977); *Commonwealth of Puerto Rico v. S. S. Zoe Colocotroni*, 61 F.R.D. 653, 658 (D.P.R. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D.Pa. 1970); *A. v. District Court of Second Judicial District*, 550 P.2d 315, 328 (Colo. 1976). Thus, petitioners' catalogue of projected difficulties in applying a "related litigation" standard has little basis in fact.

Moreover, the "related litigation" test has its analogues in other statutes as well. A prime example is Section 5(c) of the Administrative Procedure Act (5 U.S.C. §554(d)), which prohibits agency employees involved in the investigation or prosecution of one case from serving as decision makers in the same or a "factually related" case. The Attorney General has construed the term "factually related" case to refer to "a situation in which a party is faced with two different proceedings arising out of the same set of facts." Attorney General's Manual on the Administrative Procedure Act, 54 n.6 (1947). In a series of decisions, the FTC has had little difficulty in applying this standard and finding no factual relatedness between two cases. *E.g., Borg-Warner Corp.*, 3 CCH Trade Reg. Rep. ¶21,924 at 22,309-10 (FTC 1982); *Kroger Co.*, 98 F.T.C. 639, 751-52 (1981); *Grolier Inc.*, 98 F.T.C. 115, 123-24 (1981); *Columbia Broadcasting Sys., Inc.*, 67 F.T.C. 1369, 1370-71 (1965), *aff'd*, 414 F.2d 974, 982 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970). *See Cisternas-Estay v. INS*, 531 F.2d 155, 161 n.4 (3d Cir. 1976) (Gibbons, J., dissenting) (suggesting the term could encompass cases having "a common nucleus of operative facts," as that phrase was used by the Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725

(1966)). Thus, the practical difficulties perceived by petitioners in applying a "related litigation" test are more illusory than real.[20]

b. The test adequately protects government attorneys.

The "related litigation" test also adequately protects government attorneys. As shown above at pages 26-28, many of petitioners' concerns about the "chilling effect" of this test are simply ill-founded. The test adopted by the court of appeals is very narrow: it applies *only* in FOIA suits and mandates disclosure *only* when the prior litigation in question is definitely terminated *and* no related or potentially related litigation exists.

Moreover, it must be kept in mind that the FOIA contains numerous designated exemptions; any item of attorney work product might also fall within, for example, the deliberative process privilege of Exemption 5 or Exemption 7's protection of investigational records.[21] On a motion for rehearing, the court of appeals was careful to note that petitioners had never raised any of these other privileges as to the remaining documents in dispute and hence it never addressed them. Pet. App. 17a-18a. The Court should not allow petitioners to profit from their deliberate tactical decision to claim only one privilege; it should "hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 355 (1979).

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[20] However, the term "related litigation" should *not* encompass an FOIA action filed to seek disclosure of documents prepared in a prior suit. To rule otherwise would produce what the court of appeals rightly viewed as a "strange" result, because the mere filing of an FOIA action would then, in and of itself, be sufficient to trigger the applicability of an exemption to the FOIA. 671 F.2d at 557; Pet. App. 8a.

[21] This point disposes of petitioners' contention based on the *Leggett & Platt* case (Pet. Br., pp. 27-28) that a party obtaining disclosure of work product prepared for a terminated government case might obtain "valuable information" about governmental "investigative strategies." Under the FOIA, such documents would fall within Exemption 7 if their disclosure would interfere with enforcement proceedings or reveal investigative techniques. *See* footnote 19, *supra*.

C. On The Facts Of This Case, This Court Could Fashion An Even Narrower Exception To The Work Product Rule Under Exemption 5 Than That Adopted By The Court Of Appeals.

If the Court determines that the standard adopted by the court of appeals does not adequately protect the government's interests, the facts of the case permit the Court to carve out an even narrower exception to the work product privilege embodied in Exemption 5. The Court could create an exception limited to situations in which the requested documents describe improper, unauthorized or unethical investigatory conduct in the handling of government investigations and were ordered disclosed by a federal district court. Or the Court could narrow that standard further by combining it with the elements of the "related litigation" test adopted by the court of appeals. For example, the Court could order disclosure only where such records relate to: (1) improper, unauthorized or unethical investigatory tactics that have since been abandoned by the agency, (2) where the litigation and investigation for which the documents were written has been terminated, (3) where a district court has ordered, in the context of civil discovery, that the documents be disclosed, and (4) where no related or potentially related litigation exists. Given the character of the documents involved in this case, and the history of this litigation, it is clear that such a categorical exception from the work product privilege encompassed within Exemption 5 is warranted.

Such a categorical exception is consistent with the Court's recent statement in *FBI v. Abramson*, 102 S.Ct. 2054, 2064 (1982), that:

> "We are not persuaded that Congress's undeniable concern with possible misuse of governmental information for partisan political activity is the equivalent of a mandate to release any information which might document such activity. . . . [T]he Act required assessment of the harm produced by disclosure of certain types of information. Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and

> that disclosure of such information would lead to one of the listed harms, the information is exempt. Congress thus created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis."

The interpretation of the coverage of Exemption 5 proposed here would not require a balancing of need on a case-by-case basis, but would rather create a narrow categorical exception to the work product rule, much like the crime-fraud exception, which has been recognized by numerous courts in the civil discovery context.[22]

Such a narrow exception would also be consistent with the common law limits on claims of privilege and the concepts of exception and implied waiver which have been created to avoid the application of a privilege where it would be inconsistent with the adversary process. As the court of appeals explained in *In re Sealed Cases*, 676 F.2d 793 (D.C.Cir. 1982):

> "Nevertheless, even though privileges usually provide categorical protection, two common law doctrines give courts a limited ability to make sure that privileges do not serve ends for which they were not intended. These doctrines are *exception* and *implied waiver*. Exception

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[22] Recent cases holding that documents containing evidence of crime or fraud fall within an exception to the work product rule include *In re Sealed Cases*, 676 F.2d 793 D.C.Cir. 1982); *In re Grand Jury Proceedings*, 674 F.2d 309 (4th Cir. 1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979). While this exception is usually applied where the work product of the lawyer is used to further or cover up a crime or fraud perpetuated by a client, several courts have noted that it is also applicable to the wrongdoing of the lawyer. *See, e.g., In re Sealed Cases, supra*, 676 F.2d at 815 ("The *prima facie* violation may also be the attorney's, since attorney misconduct negates the premise that the adversary system furthers the cause of justice"). Moreover, in *In re Murphy*, 560 F.2d 326 (8th Cir. 1977), one of leading cases for the proposition that the work product privilege continues after the litigation for which the work was created has terminated, the court recognized a crime or fraud exception to work product where the documents "bear a close relationship to the clients' existing or future scheme to commit a crime or fraud." *Id.* at 336 n. 19.

> comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct. The leading case on exception, . . . expresses the doctrine's basic principle: 'A privilege surviv[es] until the relation is abused and vanish[es] when abuse is shown to the satisfaction of the judge . . . .' Implied waiver deals with an abuse of a privilege itself rather than of a privileged relationship. Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process." (*Id.* at 807.)

The proposed exception to the work product rule encompassed by Exemption 5 is clearly analogous to these principles of exception and implied waiver recognized in the context of civil discovery.

CONCLUSION

In summary, given that the issue of the disclosability of these documents arises in the context of the FOIA, the Court should rule that they do not fall within the ambit of that portion of the work product rule encompassed by Exemption 5. The key purpose underlying the enactment of the FOIA was free disclosure of governmental records; as Professor Kenneth Culp Davis has said:

> "The *entire* push of the Information Act is to require disclosure, except that subsection (b) states the nine exemptions to which the Act 'does not apply.' The Act is clear on its face. It has no provision that can be interpreted as a prohibition on disclosure. It contains no ambiguity and no uncertainty on that subject." (1 K. Davis, *Administrative Law Treatise* §5:8, p. 329 (2d ed. 1978); emphasis in original.)

Consequently, the exemptions incorporated in subsection (b) of the FOIA were meant to be applied by the courts in the narrowest possible way:

> "The Senate committee said: 'The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly

allowed to be kept secret by one of the exemptions. . . .' [S.Rep. No. 813, 89th Cong., 1st Sess. 10 (1965).] The House committee's statement is almost the same. [H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1965).]

"The pull of the word 'specifically' is away from all else—away from implied meanings, away from reliance on legislative history, and away from needed judicial legislation in interpreting the Act. Courts that usually constitute themselves as working partners with legislative bodies to produce sensible and desirable legislation may follow their habits in *narrowing* the ascertainable meaning of the words of an exemption, but in some degree they are restricted in following those habits in *broadening* that meaning. The 'specifically stated' restriction operates in only one direction." (1. K. Davis, *supra*, §5:28, pp. 386-87; emphasis in original.)

Petitioners have a strong burden to shoulder here; they should demonstrate unequivocally that, in the circumstances of this case, the disputed documents clearly fall within Exemption 5 and that the court of appeals' "related litigation" standard does not best reconcile the policies underlying the FOIA and the work product rule. Respondent submits that they have simply failed to do so.

For the foregoing reasons, respondent respectfully submits that the judgment below should be affirmed.

Dated: February 8, 1983

Respectfully submitted,

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No. 82-372

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. Respondent argues (Br. 8-11) that the documents at issue here do not fall within Exemption 5 of the FOIA because they were ordered released in civil discovery in *United States* v. *Americana Corp.*, Civ. No. 388-72 (D.N.J.). This contention is erroneous because Exemption 5 exempts "those documents * * * *normally* privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added)) and not just those documents *always* privileged in that context. As this Court has stated (*id.* at 149 n.16):

> [I]t is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling. Indeed, the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would "routinely be disclosed" in private litigation, H.R. Rep. No. 1497, p. 10, and we accept this as the law.

Thus, *Sears* forecloses respondent's argument that Exemption 5 does not apply if the documents sought under the FOIA have been ordered disclosed in civil discovery in one case. It is not reasonable to assume that a document held to be discoverable in one case based upon a showing of "substantial need" (Fed. R. Civ. P. 26(b)(3)) would be "routinely" available in any subsequent case or even in a later action involving the same parties. The rules of civil discovery require a showing of need in order to obtain disclosure of work product and contain no exemption for materials ordered to be disclosed in prior litigation.

If the Court were to adopt respondent's argument, the work product of government attorneys would become accessible under the FOIA whenever production is required in civil discovery, even if the action is terminated, by settlement or otherwise, before actual production occurs, or perhaps even where production is made subject to a protective order. Such a result would completely overrule the standards for disclosure established in *Sears*.

2. Respondent contends (Br. 11-16) that the documents at issue are not covered by Exemption 5 because they are allegedly the product of an "unauthorized and unethical covert investigation" (Br. 11). This claim was not raised before or decided by the court of appeals, and therefore this Court should decline to decide it in the first instance. *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. 132, 163-164 (1975); *Ramsey* v. *Mine Workers,* 401 U.S. 302, 312 (1971); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970).

Moreover, this claim is not based upon facts established in district court or supported by the record. Summary judgment was granted in favor of the Commission based upon certain undisputed material facts (see J.A. 27-29), none of which supports or even addresses respondent's allegations. Respondent's contention is also not supported by any facts stated in the district court's opinion based upon

its *in camera* examination of the documents at issue here. Significantly, neither the district court in this action nor Judge MacKinnon, both of whom viewed the documents *in camera*, found that they were the products of unauthorized or unethical activity. The district court in the *Americana* action also made no such finding.[1]

Respondent relies (Br. 1-6) upon the contents of documents relating to the *Americana* investigation that have been released, and based upon those documents, respondent draws conclusions, some of which are erroneous in important respects. However, those documents, much less

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[1]Furthermore, even if the truth of respondent's factual allegations is assumed, it is not clear that respondent's rights were violated. A statement by the Commission regarding approved methods of investigations would not necessarily give rise to any right that respondent could assert. See *United States* v. *Caceres*, 440 U.S. 741 (1979). It is also not clear that directing an FTC employee to enroll in an Americana sales training course in order to gather evidence regarding sales training materials and instructions (see Resp. Br. 12) violated DR 7-104(A)(1) of the Annotated Code of Professional Responsibility (1979). That rule contains an exception for communications "authorized by law," and federal law grants the FTC broad investigative power (see 15 U.S.C. (Supp. V) 46(a)). There is also authority for the proposition that when applied to a corporation the term "party" in DR 7-104 refers only to executive officers who can commit the corporation and not to lower-level employees, such as those who conduct training courses. See *In re FMC Corp.*, 430 F.Supp. 1108, 1110-1111 (S.D.W.Va. 1977); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978); Model Rules of Professional Conduct Rule 4.2 comment (Proposed Final Draft 1981); Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party,"* 61 Minn. L. Rev. 1007, 1014-1017 (1977).

Moreover, even assuming that the work product privilege would dissolve in civil litigation upon proof of respondent's charges, it does not necessarily follow that the materials in question would be subject to disclosure under the FOIA, since Exemption 5 exempts types of documents "*normally* privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 149). Respondent's argument would apparently require FOIA courts to conduct mini-trials concerning alleged ethical violations by government attorneys.

respondent's characterization of them, are not in evidence, and the parties did not introduce other evidence concerning the events in question. There is thus no factual basis in the record for the new argument respondent now urges upon this Court.

3. a. When respondent finally turns to the question decided by the court of appeals and on which certiorari was granted, respondent attempts to defend the result below by arguing (Br. 16-17) that "the legal standard adopted by the court of appeals is restricted to determining whether the documents are exempt from disclosure pursuant to Exemption 5, and has no applicability to civil discovery." In other words, respondent maintains that these documents should be disclosed under Exemption 5 even if they would not be discoverable in civil litigation. This approach is contrary to the language of Exemption 5, which exempts from disclosure certain materials "which would not be available by law to a party other than an agency *in litigation* with the agency" (emphasis added). Respondent's approach is also fundamentally at odds with this Court's holding that Exemption 5 exempts "those documents, and only those documents, *normally privileged in the civil discovery context*" (*NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 149 (emphasis added)). And respondent's approach would produce absurd results, for if documents not available in civil discovery may be obtained under the FOIA, a civil litigant will simply file an FOIA request if he is denied discovery or bypass discovery procedures altogether.

Respondent seeks to buttress its interpretation of Exemption 5 by contending (Br. 21) that in the FOIA context the work-product rule is subject to established limitations that do not apply in civil discovery. Although the first of these claimed limitations — that purely factual work-product materials do not fall within Exemption 5 — has been applied on occasion by some lower courts (see *Robbins Tire*

& Rubber Co. v. *NLRB*, 563 F.2d 724, 734-736 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); *Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131, 1138 (4th Cir. 1977)), this Court has not approved that interpretation of Exemption 5 (see *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 154). And its validity is certainly open to question in view of the explicit privilege for such materials in Fed. R. Civ. P. 26(b)(3).[2] Moreover, that interpretation is based in part upon the view that purely factual materials, such as witness statements, are not "memorandums or letters" and thus do not fall within the language of Exemption 5. See, *e.g.*, *Robbins Tire & Rubber Co.* v. *NLRB*, *supra*, 563 F.2d at 737. By contrast, there is nothing in the language of Exemption 5 that even arguably supports the limitations upon the work-product privilege imposed by the court below.

Respondent also relies (Br. 22) upon the fact that Exemption 5 does not apply to a previously exempted memorandum if it is expressly adopted or incorporated by reference in a final agency opinion. *FOMC* v. *Merrill*, 443 U.S. 340, 360, n.23 (1979); *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 161. However, prompt disclosure of final agency

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[2]The view that Exemption 5 does not protect purely factual work-product materials is based principally upon *EPA* v. *Mink*, 410 U.S. 73, 85-91 (1973), which held that such materials are not shielded by the deliberative process privilege incorporated in Exemption 5. See *Robbins Tire & Rubber Co.* v. *NLRB*, *supra*, 563 F.2d at 734-737; *Deering Milliken, Inc.* v. *Irving*, *supra*. But, since the deliberative process privilege would not prevent discovery of purely factual materials in civil litigation either (*EPA* v. *Mink*, *supra*, 410 U.S. at 87-88), their disclosure under the FOIA is fully consistent with the rule that Exemption 5 protects only those documents "*normally* privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 149 (emphasis added)). By contrast, the work-product privilege plainly does protect factual materials (see Fed. R. Civ. P. 26(b)(3)), and consequently their disclosure under the FOIA would appear to do violence to this Court's construction of Exemption 5.

opinions is explicitly required by the FOIA (5 U.S.C. 552(a)(2)). There is, in contrast, nothing in the FOIA expressly requiring disclosure of documents such as those at issue here. In addition, it is noteworthy that this Court has limited this intrusion upon the work-product privilege by holding that other documents falling within 5 U.S.C. 552(a)(2), such as instructions to staff that affect a member of the public, may nevertheless be shielded from disclosure under Exemption 5 on work-product grounds. *FOMC* v. *Merrill, supra,* 443 U.S. at 360 n.23; *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 160.

b. Respondent argues (Br. 22-33) that the policies underlying the work-product rule no longer apply when the litigation in connection with which the materials were prepared has ended and related litigation does not exist or potentially exist. Like the court of appeals (see Pet. App. 6a), respondent relies (Br. 23-26) upon the fact that the work-product rule was intended to safeguard the adversary process. From this, respondent reasons (Br. 26) that "once the litigation for which the documents were written has been completed, and no related or potentially related litigation exists, the possibility of damage to the adversary system is foreclosed." But as we demonstrated at some length in our opening brief (at 21-29), a lawyer's fears about the possibility that his files may be disclosed after all related proceedings have terminated and no potential litigation exists may well discourage him from amassing materials in preparation for trial or preserving those materials after the case has concluded. Such actions would seriously impair the functioning of the adversary system.

Respondent's only answer (Br. 28) is that "the need for written records will outweigh a lawyer's fear of eventual disclosure." However, this conclusory statement is neither substantiated nor explained in respondent's brief. In addition, respondent's reasoning is really an argument against

virtually all evidentiary privileges. For example, it could be argued by the same logic that the attorney-client privilege is unnecessary because a client's need to confide in his lawyer in order to obtain sound legal advice will outweigh his fear that confidential statements will be disclosed. Or it could be argued that the physician-patient privilege or the spousal privilege are superfluous for similar reasons.

Even assuming that the need for written records will outweigh most lawyers' fear that work product may subsequently be disclosed, the fear of disclosure is still likely to prevail in the minds of a significant number of attorneys, and undesirable consequences will result. Moreover, evidentiary privileges are intended to permit persons to engage in certain activities — *e.g.*, amassing work product or confiding in one's lawyer, physician, or spouse — without undue fear and anxiety. Thus, even if "the need for written records" would, in the end, overcome "the fear of eventual disclosure" under the court of appeals' rule, it would not follow that that rule is a salutary one.

Respondent's treatment of some of the subsidiary purposes of the work-product rule (Br. 27) is similarly flawed. For example, contrary to respondent's assertion, the court of appeals' rule might well induce some attorneys to rely upon work product from prior, terminated cases rather than engaging in their own independent trial preparation. Likewise, the court of appeals' rule would not eliminate an attorney's incentive to "insert false statements or misleading memoranda in [the] files" for the purpose of misleading a frequent adversary (see Resp. Br. 27). If genuine work product from a terminated case may be helpful to an adversary in a future, unrelated case, it stands to reason that false or misleading work product may be harmful to such an

adversary and therefore beneficial to the party from whom discovery is obtained.[3]

c. Respondent suggests (Br. 32) that the court of appeals' test would not produce undesirable consequences if applied in civil discovery because "irrelevant, vexatious and expensive discovery requests" may still be defeated by the district court's power to control discovery abuses. But this outer limit on the discovery process, often left to the discretion of the district courts, is not a substitute for a privilege that affords clearly defined protection. Although respondent concedes (Br. 33) that the FOIA does not contain even the relevancy requirement that limits discovery requests, since any person may obtain nonexempt documents, it claims (Br. 33) that "unduly burdensome" FOIA requests will nevertheless be discouraged because agencies may charge reasonable fees for searching for and copying requested documents. This assertion misses the point. The primary issue here is not the administrative burden of complying with FOIA requests for work product, but the harmful effects of disclosing such materials.[4] There is no reason to believe that the often minimal searching and copying charges that may be imposed would substantially reduce requests for work-product materials and, as a result, substantially lessen the injury that would be occasioned by the court of appeals' decision.

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[3]Respondent attempts to show (Br. 29-31) that the court of appeals' rule is supported by other courts and commentators. In our opening brief (at 30-32 & nn. 10, 11), we discussed the bulk of the authorities cited by respondent.

[4]Nevertheless, the burden of determining whether any related litigation exists or potentially exists would be substantial. And the cost of complying with FOIA requests far exceeds the fees agencies charge. For example, in 1982, the administrative costs incurred by the Federal Trade Commission in complying with FOIA requests totalled $639,120, while only $4,863 in fees was collected. Federal Trade Commission, *Freedom of Information Act Report 1982*, at 8.

d. Respondent attempts to demonstrate (Br. 33-35) that the related litigation test adopted by the court of appeals is workable, but respondent's efforts fall short. Respondent cites (Br. 34) several cases that have applied the test. However, simply because several courts have determined that work product either was or was not derived from what the courts deemed related litigation hardly means that the difficult problems described in our opening brief (at 21-23) will not develop. Moreover, the cases cited by respondent did not involve the federal government or federal agencies, and they therefore do not respond to our contention (Pet. Br. 22) that application of the concept of related litigation would be particularly difficult in cases involving government agencies.

Respondent maintains (Br. 34) that the court of appeals' "related litigation" test is analogous to 5 U.S.C. 554(d), which provides that an agency employee or agent who engages in the investigation or prosecution of a case may not participate in the decisionmaking process in the same or a "factually related" case. However, the court of appeals' test is not limited to "factually related" cases.[5] As noted in our opening brief (at 22), cases may be related in many other ways. Indeed, in the paragraph preceding its discussion of 5 U.S.C. 554(d), respondent lists (Br. 34) four other ways in which cases may be "related" for purposes of applying the court of appeals' test for disclosure of work product.

Respondent suggests (Br. 31-32) that uncertainty concerning the meaning of "related litigation" will not significantly influence trial preparation since attorneys are unable to predict at present whether work product will be disclosed

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[5]Even the meaning of "factually related" cases is unsettled. See Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 765 n.27 (1981).

to an adversary based upon a showing of "substantial need" (Fed. R. Civ. P. 26(b)(3)). Respondent ignores the fact that the most sensitive work product — "the mental impressions, conclusions, opinions, or legal theories of an attorney" — are protected from disclosure even when such a showing has been made (Fed. R. Civ. P. 26(b)(3); *Upjohn Co.* v. *United States*, 449 U.S. 383, 401-402 (1981)), and the district court found that the documents at issue in this case fall in that category (Pet. App. 23a). In addition, a subsequent FOIA request is probably far more likely to occur than subsequent civil litigation in which work product is sought and a sufficient showing of need is made. Thus, the uncertainty created by the decision below would far exceed any that now exists.

Respondent argues (Br. 35 n.20; emphasis in original) that "the term 'related litigation' should *not* encompass an FOIA action filed to seek disclosure of documents prepared in a prior suit." But respondent does not explain why a FOIA suit should never be regarded as "related" to a prior case even if the two cases share most of the characteristics identified by respondent (Br. 34) as relevant to this question. In this case, for example, the documents requested under FOIA were not only prepared in connection with the prior civil penalty action; they were also requested in discovery in the prior action by the same party, and the FTC's refusal to turn them over led to the dismissal of the case. The circumstances of the request also strongly suggest that respondent seeks the documents under FOIA precisely because of their relation to the prior suit.

Finally, while respondent attempts to show that the "related litigation" test is workable, respondent does not make a similar claim for the "potential" litigation test. Respondent appears to concede implicitly, as we argued in our opening brief (at 25), that the concept of "potential litigation" is "meaningless for all practical purposes."

e. Respondent contends (Br. 33, 35) that the court of appeals' decision will not hamper government litigation because some work-product materials may also fall within other FOIA exemptions. However, because respondent does not claim that this is true of all or most work product, respondent's point is largely irrelevant. The availability of other exemptions may reduce but certainly will not eliminate the deleterious consequences of the decision below. If respondent's argument were valid, it would apply equally to work product produced for litigation still in progress, but respondent does not make such a far-reaching claim.

A recent case involving respondent (*Grolier, Inc* v. *FTC*, Nos. 82-7018, 82-7178 (9th Cir. Feb. 10, 1983)) illustrates why the decision below will have a significant adverse effect upon the government's litigation efforts. Despite its awareness of the litigation in the Ninth Circuit (see Pet. App. 7a; J.A. 29), the court below held that no related case was pending or foreseeable and required disclosure of documents concerning an FTC investigation of respondent's deceptive and misleading practices in door-to-door sales of encyclopedias (Pet. App. 1a). The recent Ninth Circuit case affirmed an FTC cease and desist order relating to the very same type of practices. It is thus abundantly clear both why respondent is seeking the documents at issue here and why their nondisclosure remains important for the government's enforcement efforts despite the court of appeals' conclusion that no related litigation exists or potentially exists.

5. In conclusion, respondent urges (Br. 36) that if the Court determines that the court of appeals' decision does not adequately protect the government's interests, the judgment below should be affirmed on the narrow ground that Exemption 5 does not apply to documents relating to "(1) improper, unauthorized or unethical investigatory tactics that have since been abandoned by the agency, (2) where the litigation and investigation for which the

documents were written has been terminated, (3) where a district court has ordered, in the context of civil discovery, that the documents be disclosed, and (4) where no related or potentially related litigation exists."

This is an unadorned plea to create a special rule for this case — a rule "like a restricted railroad ticket, 'good for this day and train only.' " *County of Washington* v. *Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting), quoting *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). As we have shown, however, certain components of this proposed rule were not raised below and are based upon unproven facts, and the remaining components are legally unsound. Joining four defective arguments together does not produce a sound rule for deciding this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1983

DOJ-1983-03

(SHOW] PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00372 CFX

SHORT TITLE FTC, et al. DOCKETED: Sep 2 1982

VERSUS Grolier Inc.

Date	Proceedings and Orders
Jun 24 1982	Application for extension of time to file petition and order granting same until August 12, 1982 (Chief Justice, June 29, 1982).
Jul 30 1982	Application for further extension of time to file petition and order granting same until September 4, 1982 (Chief Justice, August 3, 1982).
Sep 2 1982	Petition for writ of certiorari filed.
Oct 9 1982	Brief of respondent Grolier Inc. in opposition filed.
Oct 13 1982	DISTRIBUTED. October 29, 1982
Oct 25 1982	Reply brief of petitioner Federal Trade Commission, et al., filed.
Nov 1 1982	REDISTRIBUTED. November 5, 1982
Nov 8 1982	Petition GRANTED.
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Dec 27 1982	Order extending time to file brief of petitioner on the

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PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00372 CFX

SHORT TITLE FTC, et al. DOCKETED: Sep 2 1982

VERSUS Grolier Inc.

Date	Proceedings and Orders
Dec 27 1982	Order extending time to file brief of petitioner on the merits until January 6, 1983.
Jan 10 1983	Joint appendix filed.
Jan 10 1983	Brief of petitioners Federal Trade Commission, et al. filed.
Feb 10 1983	Brief of respondent Grolier Inc. filed.
Feb 15 1983	SET FOR ARGUMENT. Tuesday, March 29, 1983. (1st case)
Feb 15 1983	CIRCULATED.
Feb 22 1983	Record filed.
Feb 22 1983	Certified original record & C.A. proceedings received.
Mar 22 1983	Reply brief of petitioners filed.
Mar 29 1983	ARGUED.